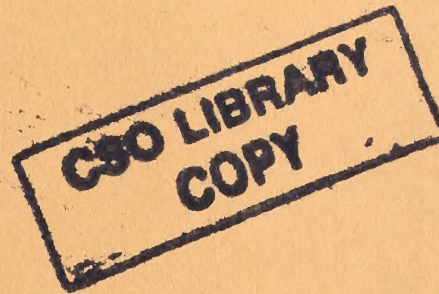


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JANUARY-DECEMBER 1993

UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

Secretary of the Interior ----- Bruce Babbitt

Office of Hearings and Appeals - Paul Smyth

Office of the Solicitor ----- John D. Leshy

INDEX-DIGEST

JANUARY - DECEMBER 1993

This index-digest covers all published and unpublished decisions and opinions, by their headnotes and legal cites, of the Department of the Interior from January 1, 1993 to December 31, 1993, rendered in the Office of Hearings and Appeals (OHA), Arlington, VA, and in the Office of the Solicitor, Interior Building, 18th and C Streets, N.W., Washington, D.C. 20240.

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SYMBOLS

AIRFA	----	American Indian Religious Freedom Act of 1978
ALJ	----	Administrative Law Judge
ANCSA	----	Alaska Native Claims Settlement Act
ANCAB	----	Alaska Native Claims Appeal Board
ANILCA	----	Alaska National Interest Lands Conservation Act
APA	----	Administrative Procedure Act
BIA	----	Bureau of Indian Affairs
BLM	----	Bureau of Land Management
CFR	----	Code of Federal Regulations
DOI	----	Department of the Interior
EA	----	Environmental Assessment
EAJA	----	Equal Access to Justice Act
EIS	----	Environmental Impact Statement
EPA	----	Environmental Protection Agency
ESA	----	Endangered Species Act
ESC	----	Endangered Species Committee
FAR	----	Federal Acquisition Regulation
FLPMA	----	Federal Land Policy and Management Act of 1976
FONSI	----	Finding of No Significant Impact
(US) FS	----	United States Forest Service
FWS	----	Fish and Wildlife Service
IBCA	----	Interior Board of Contract Appeals
IBIA	----	Interior Board of Indian Appeals
IBLA	----	Interior Board of Land Appeals
IBMA	----	Interior Board of Mine Operations Appeals
IBSMA	----	Interior Board of Surface Mining and Reclamation Appeals
IIM	----	Individual Indian Money
IMLA	----	Indian Mineral Leasing Act of 1938
IRA	----	Indian Reorganization Act
M	----	Solicitor's Opinion
MMS	----	Mineral Management Service
NPS	----	National Park Service
OHA	----	Office of Hearings and Appeals
OSM(RE)	----	Office of Surface Mining Reclamation and Enforcement
SEC	----	Office of the Secretary
SMCRA	----	Surface Mining Control and Reclamation Act of 1977
U.S.C.	----	United States Code

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Breene James O., Jr., 38 IBLA 281 (1978); vacated, (On Recon.), 42 IBLA 395 (1979).

Brick, Irving B., 36 IBLA 235 (1978); overruled, Robert R. Furman, 49 IBLA 64 (1980).

Brinkeroff, Zula C., 75 IBLA 179 (1983); modified, Santa Fe Mining, Inc., 79 IBLA 48 (1984).

Brinton, John C., Estate of, 25 IBLA 283 (1976); vacated in part, 71 IBLA 160 (1983).

Bumble Bee Seafoods, Inc., 65 IBLA 391 (1982); overruled to extent inconsistent, Rosander Mining Co., 84 IBLA 60 (1984).

Burns, David A., 30 IBLA 359 (1977); rev'd, Exxon Pipeline Co. v. Burns, Civ. No. A82-454 (Consolidated) (D. Alaska 1985).

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Caldwell, Clair R., 42 IBLA 139 (1979); overruled to extent inconsistent, Harvey A. Clifton, 60 IBLA 29 (1981).
California Energy Co., 63 IBLA 159 (1982); rev'd, (On Recon.), 85 IBLA 254, 92 I.D. 125 (1985).

California Portland Cement Co., 40 IBLA 339 (1979); overruled, Kaiser Steel Corp., 63 IBLA 363 (1982).

California Wilderness Coalition, 101 IBLA 18 (1988); vacated in part, (On Recon.), 105 IBLA 196 (1988).

Caress, Charles, 41 IBLA 302 (1979); overruled to extent inconsistent, Harvey A. Clifton, 60 IBLA 29 (1981).

Carpenter, Keith P., 112 IBLA 101 (1989); modified, (On Recon.), 113 IBLA 27 (1990).

Chesebrough, Samuel A., 49 IBLA 249 (1980); overruled to extent inconsistent, Zula C. Brinkerhoff, 75 IBLA 179 (1983).

Chiskok, Evan, 22 IBLA 153 (1975); vacated, (On Recon.), 61 IBLA 1 (1981).

Chomicki, Blanche, 51 IBLA 128 (1980); overruled, Maurice W. Coburn (On Recon.), 82 IBLA 112 (1984).

Chorney, Joan, 108 IBLA 43 (1989); vacated, (On Recon.), 109 IBLA 96 (1989).

Clipper Mining Co., 22 L.D. 527 (1896); no longer followed in part, 67 I.D. 417 (1960).

Clipper Mining Co. v. Eli Mining & Land Co., 33 L.D. 660 (1905); no longer followed in part, 67 I.D. 417 (1960).

Cohen, Ben, 21 IBLA 330 (1975); recon. denied (1977); as modified, (On Judicial Remand), 103 IBLA 316 (1988).

Colorado-Ute Electric Ass'n, Inc., 83 IBLA 358 (1984), overruled, South Central Telephone Ass'n, Inc., 98 IBLA 275 (1987).

Computation of Royalty Under Sec. 15, 51 L.D. 283 (1925); overruled, Solicitor's Opinion, M-36888, 84 I.D. 54 (1977).

Conger (Ford), Francis Ingeborg, 13 IBIA 296; modified (On Review), 13 IBIA 361, 92 I.D. 634 (1985).

Conoco, Inc., 90 IBLA 388 (1986); overruled, Celsius Energy Co., 99 IBLA 53, 94 I.D. 394 (1987).

102 IBLA 230 (1988); vacated in part, (On Recon.), 113 IBLA 243 (1990).

Continental Oil Co., 68 I.D. 186 (1961); overruled in pertinent part, Solicitor's Opinion, M-36921, 87 I.D. 291 (1980).

74 I.D. 229 (1967); distinguished, Solicitor's Opinion, M-36927, 87 I.D. 616 (1980).

Cook Inlet Region, Inc., 90 IBLA 135, 92 I.D. 620 (1985); overruled in part, (On Recon.), 100 IBLA 50, 94 I.D. 422 (1987).

Corinth Partnership, 80 IBLA 31 (1984); vacated & remanded, (On Remand), 83 IBLA 277 (1984).

Coupey, Paul S., 33 IBLA 177 (1977); overruled to extent inconsistent, Zula C. Brinkerhoff, 75 IBLA 179 (1983).

Cranston, Monty, 67 IBLA 364 (1982); overruled to extent inconsistent, Pandora Petroleum Co., 74 IBLA 173 (1983).

Cummings, Kenneth F., 62 IBLA 206 (1982); overruled to extent inconsistent, Douglas H. Willson, 86 IBLA 135, 92 I.D. 153 (1985).

Cupper, Jerry, 45 IBLA 215 (1980); overruled to extent inconsistent, Harvey A. Clifton, 60 IBLA 29 (1981).

Davidson, Robert A., 13 IBLA 368 (1973); overruled to extent inconsistent, J. Burton Tuttle, 49 IBLA 278, 87 I.D. 350 (1980).

Davis, E. W., A-29889 (1964); no longer followed in part, Ruth E. Han, 13 IBLA 296, 80 I.D. 698 (1973).

Debord, Wayne E., 50 IBLA 216, 87 I.D. 465 (1980); modified, 54 IBLA 61 (1981).

Degnan, June I., 108 IBLA 282 (1989); rev'd, (On Recon.), 111 IBLA 360 (1989).

Dugan Production Corp., 103 IBLA 362 (1988); vacated, 117 IBLA 153 (1990).

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Eakon, Hilma, 22 IBLA 41 (1975); vacated, (On Recon.), 64 IBLA 97 (1982).

Eastern Associated Coal Corp., 3 IBMA 331, 81 I.D. 567, 1974-75 OSHD par. 18,706 (1974); overruled in part, Alabama By-Products Corp. (On Recon.), 7 IBMA 85, 83 I.D. 574 (1976); overruled in part, Zeigler Coal Co., 7 IBMA 280, 84 I.D. 127 (1977).

5 IBMA 185, 82 I.D. 506, 1975-76 OSHD par. 20,041 (1975); set aside in part, (On Recon.), 7 IBMA 14, 83 I.D. 425 (1976).

Eckels, Richard W., 62 IBLA 1 (1982); modified, (On Recon.), 65 IBLA 76 (1982).

Eklutna, Appeal of, 1 ANCAB 190, 83 I.D. 619 (1976); modified, Solicitor's Opinion, 85 I.D. 1 (1978).

Energy Partners, 21 IBLA 352 (1975); distinguished, Chevron Oil Co., 32 IBLA 275 (1977).

Engelhardt, Daniel A., 61 IBLA 65 (1981); set aside, (On Recon.), 62 IBLA 93, 89 I.D. 82 (1982).

Enserch Exploration, Inc., 70 IBLA 25 (1983); overruled to extent inconsistent, Lear Petroleum Exploration, Inc., 95 IBLA 304 (1987).

Esplin, Lee J., 56 I.D. 325 (1938); overruled to extent it applies, Solicitor's Opinion, M-36914, 86 I.D. 553 (1979).

Federal-American Partners, 37 IBLA 330 (1978); overruled to extent inconsistent, Zula C. Brinkerhoff, 75 IBLA 179 (1983).

Freeman Coal Mining Co., 3 IBMA 434, 81 I.D. 723, 1974-75 OSHD par. 19,177 (1974); overruled in part, Zeigler Coal Co., 7 IBMA 280, 84 I.D. 127 (1977).

Freeman v. Summers, 52 L.D. 201 (1927); overruled, U.S. v. Winegar, 16 IBLA 112, 81 I.D. 370 (1974); reinstated, U.S. v. Bohme, 51 IBLA 97, 87 I.D. 535 (1980).

Fults, Bill, 61 I.D. 437 (1905); overruled, 69 I.D. 181 (1962).

Garrett, Fred M., 66 IBLA 49 (1982); overruled to extent inconsistent, Pandora Petroleum Co., 74 IBLA 173 (1983).

General Electric Co., 55 IBLA 185 (1981); overruled to extent inconsistent, 56 IBLA 327 (1981).

Gifford, Samuel Lee, 53 IBLA 23 (1981); modified, (On Recon.), 55 IBLA 1 (1981).

Glassford, A. W., 56 I.D. 88 (1937); overruled to extent inconsistent, Emily K. Connell, A-29176, 70 I.D. 159 (1963).

Gold, Michael, 108 IBLA 231 (1989); modified, (On Recon.), 115 IBLA 218 (1990).

Goldbelt, Inc., 74 IBLA 308 (1983); affirmed in part, vacated in part, & remanded for evidentiary hearing, 85 IBLA 273, 92 I.D. 134 (1985).

Golden Valley Electric Ass'n, 85 IBLA 363 (1985); vacated, (On Recon.), 98 IBLA 203 (1987).

Gosuk, Jack, 22 IBLA 392 (1975); vacated, (On Recon.), 54 IBLA 306 (1981).

Gray, Eleanor A., A-28710 (1962); vacated as to Claim No. 4, A-28710 (Supp.) (May 7, 1964).

Gulf Oil Exploration & Production Co., 94 IBLA 364 (1986); modified, Atlantic Richfield Co., 105 IBLA 218, 95 I.D. 235 (1988).

Hagood, L. N., 65 I.D. 405 (1958); overruled, Beard Oil Co., 77 I.D. 166 (1970).

Hanlon, Christina Lavern, 23 IBLA 36 (1975); vacated, Andrew Gordon McKinley (On Recon.), 61 IBLA 282 (1982).

Hays, Alice, 36 IBLA 313 (1978); distinguished, Curtis Wheeler, 62 IBLA 384 (1982).

Hiko Bell Mining & Oil Co., 93 IBLA 143 (1986); sustained as modified, (On Recon.), 100 IBLA 371, 95 I.D. 1 (1988).

Holbeck, Halvor F., A-30376 (Dec. 2, 1965); overruled, 79 I.D. 416 (1972).

Hulsman, Lorinda L., 32 IBLA 280 (1977); overruled, James R. Hensher, 85 IBLA 343, 92 I.D. 140 (1985).

Hunt, Emily B., 23 IBLA 205 (1976); vacated, (On Recon.), 64 IBLA 304 (1982).

Idaho Dept. of Water Resources, 32 IBLA 89 (1977); vacated, (On Recon.), 49 IBLA 221 (1980).

Jacobsen, Stoddard v. BLM, 97 IBLA 182 (1987); overruled in part, (On Recon.), 103 IBLA 83 (1988).

Jaycox, Myrtle, 22 IBLA 324 (1975); vacated, (On Recon.), 64 IBLA 97 (1982).

Jerome P. McHugh & Assocs., 113 IBLA 341 (1990); vacated, (On Recon.), 117 IBLA 303 (1991)

Johansen, Daniel, 23 IBLA 292 (1976); vacated, (On Recon.), 54 IBLA 295 (1981).

Jones, Sam P., 74 IBLA 242 (1983); affirmed in part as modified, & vacated in part, (On Judicial Remand), 84 IBLA 331 (1985).

Kaguk, Luke F., 84 IBLA 350 (1985); overruled to extent inconsistent, Stephen Northway, 96 IBLA 301 (1987).

Keating Gold Mining Co., 52 L.D. 671 (1929); overruled in part, Arizona Public Service Co., 5 IBLA 137, 79 I.D. 67 (1972).

Keller, Herman A., 14 IBLA 188, 81 I.D. 26 (1974); distinguished, Robert E. Belknap, 55 IBLA 200 (1981).

Kenai Natives Ass'n, 87 IBLA 58 (1985); overruled to extent inconsistent, Matilda Titus, 92 IBLA 340 (1986).

Kenai Natives Ass'n, Inc., 87 IBLA 58 (1985), overruled in part, Bay View, Inc., 126 IBLA 281 (1993).

Kenyon, Stephen, 51 IBLA 368 (1980); vacated in part, (On Recon.), 65 IBLA 44 (1982).

Kern County Land Co. (On Recon.), IA-0168748, IA-0170927, & IA-0170928; approved by Under Secretary Carver, Oct. 25, 1965; not followed to extent inconsistent with this opinion.

Kerr-McGee Nuclear Corp., 41 IBLA 197 (1979); rev'd, (On Recon.), 43 IBLA 348 (1979).

Kight, W. Verne, 47 IBLA 351 (1980); rev'd in part, (On Recon.), 61 IBLA 216 (1982).

Konukpeak, Nora E., 23 IBLA 86 (1975); vacated, (On Recon.), 60 IBLA 394 (1981).

L. A. Melka Marine Construction & Diving Co., Inc., IBCA-1511-9-81, 90 I.D. 322 (1983); vacated & appeal dismissed, (On Recon.), IBCA-1511-9-81, 90 I.D. 491 (1983).

Land Classification State of California, A-31022 (Aug. 14, 1968 & Jan. 23, 1969); overruled to extent inconsistent, A-31022 (Oct. 14, 1969); as amended, Oct. 27, 1969.

Layne & Bowler Export Corp., IBCA-245, 68 I.D. 33 (1961); overruled insofar as it conflicts, Schweigert, Inc. v. U.S., Ct. Cl. No. 26-66 (Dec. 15, 1967), & Galland-Henning Mfg. Co., IBCA-34-12-65 (Mar. 29, 1968).

Liability of Indian Tribes for State Taxes Imposed on Royalty Received From Oil & Gas Leases, 58 I.D. 535 (1943); superseded to extent inconsistent, Solicitor's Opinion, M-36896, 84 I.D. 905 (1977).

Liberty Petroleum Corp., 73 IBLA 368 (1983); rev'd, ANR Production Co., 82 IBLA 228 (1984).

Lieb, Paul D., 116 IBLA 279 (1990), no longer followed in part, Carol B. Rodgers, 126 IBLA 117 (1993).

Lingren, Sarah F., 23 IBLA 174 (1975); vacated, (On Recon.), 54 IBLA 181 (1981).

Liss, Merwin E., 67 I.D. 385 (1960); overruled, Arthur E. Meinhardt, 11 IBLA 139, 80 I.D. 395 (1973).

Lomax Exploration Co., 105 IBLA 1 (1988); modified, Ladd Petroleum Corp., 107 IBLA 5 (1989).

Luke, Louise, 22 IBLA 388 (1975); vacated, (On Recon.), 60 IBLA 399 (1981).

Luse, Jeanette L., 61 I.D. 103 (1953); distinguished, Richfield Oil Corp., 71 I.D. 243 (1964).

Lyles, Clayton, Mr. & Mrs., & Messrs. Lonnie & Owen Lyles, Uniform Relocation Assistance Appeal of, 8 OHA 23 (1989); modified, (On Recon. by Director), 8 OHA 94 (1989).

Lynn, Robert G., 70 IBLA 141 (1983); vacated, (On Recon.), 73 IBLA 288 (1983).

Lytle, Frank C., III, 69 IBLA 210 (1982); overruled to extent inconsistent, L. Lee Horschman, 74 IBLA 360 (1983).

Malesky, James A., 102 IBLA 175 (1988); rev'd, (On Recon.), 106 IBLA 327 (1989).

Manzonie, John & Adellie, I.G.D. 615; distinguished, A-29334 (July 26, 1963).

Marathon Oil Co., 94 IBLA 78 (1986); vacated in part, (On Recon.), 103 IBLA 138 (1988).

Martin, Wilbur, Sr., A-25862 (May 31, 1950); overruled to extent inconsistent, U.S. v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981).

McMurtrie, Nancy, 73 IBLA 247 (1983); overruled to extent inconsistent, Shaw Resources, Inc., 79 IBLA 153, 91 I.D. 122 (1984).

Mead, Robert E., 61 I.D. 111 (1955); overruled, Jones-O'Brien, Inc., 85 I.D. 89 (1978).

Memmott, Sandra, 88 IBLA 379 (1985); reaffirmed as modified, (On Recon.), 93 IBLA 113 (1986).

Merritt-Chapman & Scott Corp., IBCA-257 (June 22, 1961); distinguished, IBCA-274 (Sept. 15, 1961).

Mertz, Dennis J., 43 IBLA 302 (1979); overruled to extent inconsistent, Harvey A. Clifton, 60 IBLA 29 (1981).

Mezey, Cliff, 50 IBLA 157 (1980); vacated, (On Recon.), 66 IBLA 178 (1982).

Michigan Wisconsin Pipeline Co., 64 IBLA 247 (1982); vacated in part, (On Recon.), 80 IBLA 317 (1984).

Mikesell, Henry D., A-24112 (Mar. 11, 1946); rehearing denied (June 20, 1946); overruled to extent inconsistent, 70 I.D. 149 (1963).

Miller, Duncan, A-29760 (Sept. 18, 1963); A-30742 (Dec. 2, 1966); and A-30722 (Apr. 14, 1967); overruled, 6 IBLA 216, 79 I.D. 416 (1972).

Miller, Duncan, 6 IBLA 283 (1972); overruled to extent inconsistent, Jones-O'Brien, Inc., 85 I.D. 89 (1978).

Mingo Oil Producers, 94 IBLA 384 (1986); vacated, (On Recon.), 98 IBLA 133 (1987).

Minnier, Willene, 45 IBLA 1 (1980); overruled to extent inconsistent, Harvey A. Clifton, 60 IBLA 29 (1981).

Mobil Oil Corp., 35 IBLA 375, 85 I.D. 225 (1978); limited in effect, Carl Gerard, 70 IBLA 343 (1983).

Morgan, Henry S., 65 I.D. 369 (1958); overruled to extent inconsistent, 71 I.D. 22 (1964).

Moses, Beulah, 21 IBLA 157 (1975); vacated, (On Recon.), 60 IBLA 252 (1981).

Mountain Fuel Supply Co., A-31053 (Dec. 19, 1969); overruled, 6 IBLA 216, 79 I.D. 416 (1972).

Munsey v. Smitty Baker Coal Co., Inc., 1 IBMA 144; 79 I.D. 501 (1972); distinguished, Sewell Coal Co., 2 IBMA 80, 80 I.D. 251 (1973).

Muslow, James, Sr., 51 IBLA 19 (1980); affirmed in part, rev'd in part, (On Recon.), 65 IBLA 352 (1982).

Myll, Clifton O., 71 I.D. 458 (1964); supplemented, 71 I.D. 486 (1964); vacated, 72 I.D. 536 (1965).

Nat'l Livestock Co., I.G.D. 55 (1938); overruled, U.S. v. Maher, 5 IBLA 209, 79 I.D. 109 (1972).

Naughton, Harold J., 3 IBLA 237, 78 I.D. 300 (1971); distinguished, Kristeen J. Burke, 20 IBLA 162 (1975).

Nenana, City of, 98 IBLA 177 (1987); as modified, (On Recon.), 106 IBLA 26 (1988), vacated, Toghoththele Corp. v. Luhan, No. 89-1763 (Aug. 1, 1991).

New Mexico, State of, 24 IBLA 135 (1976); vacated, (On Recon.), 50 IBLA 367 (1980).

Northway Natives, Inc., 69 IBLA 219 (1982); overruled to extent inconsistent, U.S. Fish & Wildlife Service, 72 IBLA 218 (1983).

Northwest Pipeline Co., 65 IBLA 245 (1982); set aside, (On Recon.), 77 IBLA 46 (1983).

Northwestern Colorado Broadcasting Co., 18 IBLA 62 (1974); overruled, Peregrine Broadcasting Co., 62 IBLA 133 (1982).

Oil & Gas Privilege & License Tax, Fort Peck Reservation, Under Laws of Montana, M-36318 (Oct. 13, 1955); superseded to extent inconsistent, Solicitor's Opinion, M-36896, 84 I.D. 905 (1977).

Opinion of Assoc. Solicitor (Lands), M-34999 (Oct. 22, 1947); distinguished, Solicitor's Opinion, M-36613, 68 I.D. 433 (1961).

Opinion of Assoc. Solicitor for Indian Affairs, M-36756 (Oct. 8, 1968); vacated as to conflict, Solicitor's Opinion, M-36756 (Supp.) (Nov. 18, 1971).

Opinion of Chief Counsel, 43 L.D. 339 (1914); explained, Solicitor's Opinion, M-36634, 68 I.D. 372 (1961).

Opinion of Deputy Ass't Secy (Dec. 2, 1966); superseded to extent inconsistent, Solicitor's Opinion, M-36896, 84 I.D. 905 (1977).

Opinion of Secy, M-36733, 75 I.D. 147 (1968); vacated, Solicitor's Opinion, M-36733 (Supp.), 76 I.D. 69 (1969).

Opinion of Solicitor, 55 I.D. 14 (1934); overruled so far as inconsistent, Solicitor's Opinion, M-36803, 77 I.D. 49 (1970).

Opinion of Solicitor, M-27690 (June 15, 1934); overruled to extent of conflict, Solicitor's Opinion, M-36936, 88 I.D. 586 (1981).

Opinion of Solicitor, M-28198 (Jan. 8, 1936); finding inter alia, Indian title extinguished, is well founded, & is affirmed, Solicitor's Opinion, M-36886, 84 I.D. 1 (1977); overruled, Solicitor's Opinion, M-36908, 86 I.D. 3 (1979).

Opinion of Solicitor, 55 I.D. 466 (1936); overruled to extent it applies to 1926 Exec. Order, Solicitor's Opinion, M-36914, 86 I.D. 553 (1979).

Opinion of Solicitor, M-34326, 59 I.D. 147 (1945); overruled in part, Solicitor's Opinion, M-36887, 84 I.D. 72 (1977).

Opinion of Solicitor, M-36047, 60 I.D. 436 (1950); will not be followed to extent of conflict, Solicitor's Opinion, M-36677, 72 I.D. 92 (1965).

Opinion of Solicitor, M-36051 (Dec. 7, 1950); modified, Solicitor's Opinion, M-36863, 79 I.D. 51 (1972).

Opinion of Solicitor, M-36241 (Sept. 22, 1954); overruled as far as inconsistent, Solicitor's Opinion, M-36907, 85 I.D. 433 (1978).

Opinion of Solicitor, M-36410 (Feb. 11, 1957); overruled to extent of conflict, Solicitor's Opinion, M-36936, 88 I.D. 586 (1981).

Opinion of Solicitor, M-36429, 64 I.D. 393 (1957); no longer followed, B. E. Burnaugh, A-28340 (Supp.), 67 I.D. 366 (1960).

Opinion of Solicitor, M-36434 (Sept. 12, 1958); overruled to extent inconsistent, Turner Smith, Jr., 66 IBLA 1, 89 I.D. 386 (1982).

Opinion of Solicitor, M-36456, 64 I.D. 435 (1957); not followed to extent it conflicts with these views, Solicitor's Opinion, M-36456 (Supp.), 76 I.D. 14 (1969).

Opinion of Solicitor, M-36463, 64 I.D. 351 (1957); overruled, Solicitor's Opinion, M-36706, 74 I.D. 165 (1967).

Opinion of Solicitor, M-36512 (July 29, 1958); overruled to extent inconsistent, Emily K. Connell, A-29176, 70 I.D. 159 (1963).

Opinion of Solicitor, M-36531 (Oct. 27, 1958) & M-36531 (Supp.) (July 20, 1959); overruled, Solicitor's Opinion, M-36629, 69 I.D. 110 (1962).

Opinion of Deputy Solicitor, M-36562 (Aug. 21, 1959); overruled, Solicitor's Opinion, M-36911, 86 I.D. 151 (1979).

Opinion of Solicitor, M-36613, 68 I.D. 433 (1961); distinguished & limited, Solicitor's Opinion, M-36666, 72 I.D. 245 (1965).

Opinion of Solicitor, M-36767 (Nov. 1, 1967); supplementing, Solicitor's Opinion, M-36599, 69 I.D. 195 (1962).

Opinion of Solicitor, M-36779 (Nov. 17, 1969), & M-36841 (Nov. 9, 1971); distinguished & overruled, Solicitor's Opinion, M-36918, 86 I.D. 661 (1979).

Opinion of Solicitor, M-36886, 84 I.D. 1 (1977); overruled, Solicitor's Opinion, M-36908, 86 I.D. 3 (1979).

Opinion of Solicitor, M-36905 (Supp.), 88 I.D. 903 (1981); earlier opinions withdrawn, Solicitor's Opinion, M-36938, 88 I.D. 903 (1981).

Opinion of Solicitor, M-36910, 86 I.D. 89 (1979); modified, Solicitor's Opinion, M-36910 (Supp.), 88 I.D. 909 (1981).

Opinion of Solicitor, M-36915, 86 I.D. 400 (1979); modified to extent inconsistent, Solicitor's Opinion, M-36915 (Supp. I), 90 I.D. 255 (1983).

Oregon Alder-Maple Co., 1 IBLA 241 (1971); distinguished, Nordic Veneers, Inc., 3 IBLA 86 (1971).

Oregon Portland Cement Co., 66 IBLA 204 (1982); vacated, (On Judicial Remand), 84 IBLA 186 (1984).
Orem Development Co. v. Calder, A-26604 (Dec. 18, 1953); decision set aside & case remanded, (On Recon.), 90 I.D. 223 (1983).

Page, Ralph, 8 IBLA 435 (1972); explained, Sam Rosetti, 15 IBLA 288, 81 I.D. 251 (1974).

Paine, John A., 22 IBLA 56 (1975); vacated, 66 IBLA 77 (1982).

Pardee Petroleum Corp., 98 IBLA 20 (1987); overruled in part to extent inconsistent with Great Western Petroleum & Refining Co., 124 IBLA 16 (1992).

Peters, Curtis D., 13 IBIA 4, 80 I.D. 595 (1973); overruled, James R. Hensher, 85 IBLA 343, 92 I.D. 140 (1985).

Phebus, Clayton, 48 L.D. 128 (1921); overruled so far as in conflict, 50 L.D. 281 (1924); overruled to extent inconsistent, Emily K. Connell, A-29176, 70 I.D. 159 (1963).

Phillips, Cecil H., A-30851 (Nov. 16, 1967); overruled, Duncan Miller, 6 IBLA 216, 79 I.D. 416 (1972).

Phillips, Vance W., 14 IBLA 79 (1973); modified, Vance W. Phillips, 19 IBLA 211 (1975).

Plomis, Wilfred, 62 IBLA 162 (1982); modified in part, Horace H. Alvord, IV, 80 IBLA 49 (1984).

Provinse, David A., 35 IBLA 221, 85 I.D. 154 (1978); overruled to extent inconsistent, 89 IBLA 154 (1985).

49 IBLA 134 (1980); overruled to extent inconsistent, 57 IBLA 319 (1981).

Ranger Fuel Corp., 2 IBMA 163, 80 I.D. 708 (1973); set aside, Ranger Fuel Corp., 2 IBMA 186, 80 I.D. 604 (1973).

Rayburn, Ethel Cowgill, A-28866 (Sept. 6, 1962); modified, T. T. Cowgill, 19 IBLA 274 (1975).

Reich, Harry, 27 IBLA 123 (1976); distinguished, 57 IBLA 357 (1981).

Reliable Coal Corp., 1 IBMA 50, 78 I.D. 199 (1971); distinguished, Zeigler Coal Corp., 1 IBMA 71, 78 I.D. 362 (1971).

Relocation of Flathead Irrigation Project's Kerr Substation & Switchyard, M-36735 (Jan. 31, 1968); rev'd & withdrawn, Solicitor's Opinion, M-36735 (Supp.), 83 I.D. 346 (1976).

Renwick, Richard, 76 IBLA 57 (1983); rev'd & remanded, (On Recon.), 78 IBLA 360 (1984).
Republic Oil & Mining Co., 35 IBLA 212 (1978); distinguished, Curtis Wheeler, 62 IBLA 384 (1982).

Resources Exploration & Mining, Inc., 42 IBLA 63 (1979); modified, (On Recon.), 43 IBLA 89 (1979).

Rhonda Coal Co., 4 IBSMA 124, 89 I.D. 460 (1982); modified to extent inconsistent, Kimberly Sue Coal Co., Inc., 74 IBLA 170 (1983).

Ricci, Charles P., 33 IBLA 288 (1978); set aside & remanded, (On Recon.), 34 IBLA 186 (1978).

Ross, John R., A-27259 (Mar. 12, 1956); set aside in part, Robert C. Ellis, A-29185 (Sept. 9, 1964).
Sanford, Nora L., 43 IBLA 74 (1979); vacated, (On Recon.), 63 IBLA 335 (1982).

Schweite, Helena M., 14 IBLA 305 (1974); distinguished, Kristeen J. Burke, 20 IBLA 162 (1975).

Seggerson, Edward, Jr., 67 IBLA 189 (1982); modified, (On Recon.), 74 IBLA 267 (1983).

Shaw Resources, Inc., 73 IBLA 291 (1983); reconsidered & modified, 79 IBLA 153, 91 I.D. 122 (1984).

Shillander, H. E., A-30279 (Jan. 26, 1965); overruled, 6 IBLA 216, 79 I.D. 416 (1972).

Sierra Club, 79 IBLA 240 (1984); set aside, (On Recon.), 84 IBLA 175 (1984).

Silver Spot Metals, Inc., 51 IBLA 212 (1980); overruled to extent inconsistent, Zula C. Brinkeroff, 75 IBLA 179 (1983).

Simpson, Robert E., A-4167 (Jan. 22, 1970); overruled to extent inconsistent, U.S. v. Union Carbide Corp., 31 IBLA 72, 84 I.D. 309 (1977).

Smith, James W. (IBLA 80-57 & IBLA 80-67), 46 IBLA 233 (1980); IBLA 80-67; dismissed, 55 IBLA 390 (1981).

Smith, M. P., 51 L.D. 251 (1925); overruled, Solicitor's Opinion, M-36888, 84 I.D. 54 (1977).

Snow, George Val, 46 IBLA 101 (1980); vacated, (On Judicial Remand), 79 IBLA 261 (1984).

Standard Oil Co. of California, 76 I.D. 271 (1969); no longer followed, 5 IBLA 26, 79 I.D. 23 (1972).

Southern Utah Wilderness Alliance, 100 IBLA 63 (1987); overruled, Utah Chapter of the Sierra Club, 121 IBLA 1, 98 I.D. 267 (1991).

Star Gold Mining Co., 47 L.D. 38 (1919); distinguished, U.S. v. Alaska Empire Gold Mining Co., 71 I.D. 273 (1964).

State Production Taxes on Tribal Royalties from Leases Other than Oil & Gas, M-36345 (May 4, 1956); superseded to extent inconsistent, Solicitor's Opinion, M-36896, 84 I.D. 905 (1977).

Stevens, David E., 23 IBLA 221 (1976); vacated, 64 IBLA 72 (1982).

Stevens, Marion, 23 IBLA 280 (1976); vacated, 64 IBLA 69 (1982).

St. Pierre v. Comm'r of Indian Affairs, 9 IBIA 203, 89 I.D. 132 (1982); overruled, Burnette v. Deputy Ass't Secretary--Indian Affairs (Operations), 10 IBIA 464, 89 I.D. 609 (1982).

Superior Oil Co., A-28897 (Sept. 12, 1962); distinguished in dictum, 6 IBLA 318, 79 I.D. 439 (1972).

T.E.T. Partnership, 84 IBLA 10 (1984); petition granted & prior decision vacated, (On Recon.), 88 IBLA 13 (1985).

Tevuk, David, 22 IBLA 296 (1975); rev'd & remanded, (On Recon.), 29 IBLA 296 (1975).

Thomas, John C., 53 IBLA 182 (1981); vacated, (On Recon.), 59 IBLA 364 (1981).

Tibbetts, R. Gail, 43 IBLA 210, 86 I.D. 538 (1979); overruled in part, Hugh B. Fate, Jr., 86 IBLA 215 (1985).

Titus, Walter, 22 IBLA 233 (1975); vacated & remanded, (On Recon.), 77 IBLA 321 (1983).

Towl v. Kelly, 54 I.D. 455 (1934); overruled, Ralph F. Rosenbaum, 66 IBLA 374, 89 I.D. 415 (1982).

Tugatuk, Anuska, 23 IBLA 182 (1976); vacated, (On Recon.), 59 IBLA 345 (1981).

Union Oil Co., 56 IBLA 206 (1981); vacated, (On Recon.), 58 IBLA 166 (1981).

Union Oil Co. of California (Supp.), 72 I.D. 313 (1965); overruled & rescinded in part, U.S. v. Energy Resources Technology Land, Inc., 74 IBLA 117 (1983).

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476	-----	24 IBIA 33 (May 28, 1993) 24 IBIA 55 (June 15, 1993) 24 IBIA 209 (Sept. 23, 1993)
476(a)	-----	24 IBIA 209 (Sept. 23, 1993)
476(d)(1)	-----	24 IBIA 209 (Sept. 23, 1993)
476(e)	-----	24 IBIA 297 (Apr. 22, 1993)
479	-----	24 IBIA 33 (May 28, 1993)
495	-----	127 IBLA 1 (July 12, 1993)
503	-----	24 IBIA 209 (Sept. 23, 1993) 25 IBIA 4 (Nov. 8, 1993)
640d-640d-28	-----	24 IBIA 65 (June 22, 1993)
640d-7(e)	-----	24 IBIA 65 (June 22, 1993)
640d-7(f)(3)	-----	24 IBIA 65 (June 22, 1993)
640d-27(a)	-----	24 IBIA 65 (June 22, 1993)
691-708	-----	24 IBIA 33 (May 28, 1993)
711-711f	-----	24 IBIA 33 (May 28, 1993)
721-727	-----	24 IBIA 33 (May 28, 1993)
741-775	-----	24 IBIA 33 (May 28, 1993)
761-768	-----	24 IBIA 33 (May 28, 1993)
791-807	-----	24 IBIA 33 (May 28, 1993)
821-826	-----	24 IBIA 33 (May 28, 1993)
841-853	-----	24 IBIA 33 (May 28, 1993)
861-861c	-----	24 IBIA 33 (May 28, 1993)
891-901	-----	24 IBIA 33 (May 28, 1993)
903-903f	-----	24 IBIA 33 (May 28, 1993)
1300b-11(a)	-----	25 IBIA 6 (Nov. 12, 1993)
1300b-11-1300b-16	---	25 IBIA 6 (Nov. 12, 1993)
1300b-14(a)	-----	25 IBIA 6 (Nov. 12, 1993)
1300b-14(b)	-----	25 IBIA 6 (Nov. 12, 1993)
1300b-15	-----	25 IBIA 6 (Nov. 12, 1993)
1302	-----	24 IBIA 209 (Sept. 23, 1993) 24 IBIA 264 (Oct. 20, 1993) 25 IBIA 6 (Nov. 12, 1993)
1302(1)	-----	24 IBIA 264 (Oct. 20, 1993)
1302(5)	-----	25 IBIA 6 (Nov. 12, 1993)
1302(8)	-----	25 IBIA 6 (Nov. 12, 1993)
1302(9)	-----	25 IBIA 6 (Nov. 12, 1993)
1322(b)	-----	25 IBIA 6 (Nov. 12, 1993)
1401-1408	-----	24 IBIA 92 (July 8, 1993)
1401(a)	-----	24 IBIA 92 (July 8, 1993)
1402	-----	24 IBIA 92 (July 8, 1993)
1402-1405	-----	24 IBIA 92 (July 8, 1993)
1403	-----	24 IBIA 92 (July 8, 1993)
1403-1404	-----	24 IBIA 92 (July 8, 1993)
1463	-----	23 IBIA 142 (Jan. 5, 1993)
2101-2108	-----	25 IBIA 65 (Dec. 6, 1993)
2206	-----	23 IBIA 147 (Jan. 7, 1993)
2206(a)	-----	24 IBIA 131 (July 28, 1993)
2501-2511	-----	IBCA-3037, 100 I.D. 45 (1993)

TITLE 25 (Cont.)

2502(d) -----	IBCA-3037, 100 I.D. 45 (1993)
2508(e) -----	IBCA-3037, 100 I.D. 45 (1993)
2701-2721 -----	23 IBIA 216 (Mar. 3, 1993)
	24 IBIA 55 (June 15, 1993)
2701 <u>et seq.</u> -----	23 IBIA 216 (Mar. 3, 1993)
2701(2) -----	23 IBIA 216 (Mar. 3, 1993)
2703(d) -----	23 IBIA 216 (Mar. 3, 1993)
2703(9) -----	23 IBIA 216 (Mar. 3, 1993)
2709 -----	23 IBIA 216 (Mar. 3, 1993)
2710(b) (2) (D) -----	23 IBIA 216 (Mar. 3, 1993)
2711 -----	23 IBIA 216 (Mar. 3, 1993)
2711(b) -----	23 IBIA 216 (Mar. 3, 1993)
2711(c) -----	23 IBIA 216 (Mar. 3, 1993)
2711(d) -----	23 IBIA 216 (Mar. 3, 1993)
3001-3013 -----	125 IBLA 107 (Jan. 14, 1993)
3002 -----	125 IBLA 107 (Jan. 14, 1993)

TITLE 26:

sec. 6402 -----	127 IBLA 220 (Sept. 23, 1993)
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TITLE 28:

sec. 220 -----	24 IBIA 33 (May 28, 1993)
1360 -----	25 IBIA 6 (Nov. 12, 1993)
2401(a) -----	24 IBIA 4 (May 4, 1993)
2415 -----	127 IBLA 96 (July 27, 1993)
	M-36977, 100 I.D. 418 (1993)
2415(a) -----	126 IBLA 174 (May 11, 1993)
	127 IBLA 291 (Oct. 7, 1993)
2415(b) -----	125 IBLA 303 (Mar. 16, 1993)
2671-2680 -----	25 IBIA 62 (Dec. 1, 1993)

TITLE 30:

sec. 22 -----	126 IBLA 72 (Apr. 19, 1993)
	127 IBLA 105 (Aug. 9, 1993)
	127 IBLA 181 (Sept. 7, 1993)
23 -----	127 IBLA 181 (Sept. 7, 1993)
28 -----	128 IBLA 26 (Nov. 16, 1993)
36 -----	127 IBLA 122 (Aug. 23, 1993)
38 -----	127 IBLA 73 (July 20, 1993)
	127 IBLA 211 (Sept. 14, 1993)
49a -----	M-36911 (Supp. I), 100 I.D. 103 (1993)
181 -----	127 IBLA 279 (Oct. 5, 1993)
181-287 -----	125 IBLA 210 (Feb. 5, 1993)
	126 IBLA 124 (Apr. 29, 1993)
181 <u>et seq.</u> -----	M-36911 (Supp. I), 100 I.D. 103 (1993)
185 -----	127 IBLA 282 (Oct. 7, 1993)

TITLE 30 (Cont.)

185(c) (2) -----	125 IBLA 210 (Feb. 5, 1993)
188(b) -----	125 IBLA 150 (Jan. 21, 1993)
	126 IBLA 111 (Apr. 29, 1993)
188(c) -----	125 IBLA 150 (Jan. 21, 1993)
	126 IBLA 117 (Apr. 29, 1993)
188(d) -----	125 IBLA 150 (Jan. 21, 1993)
	126 IBLA 111 (Apr. 29, 1993)
188(e) -----	125 IBLA 150 (Jan. 21, 1993)
188(g) -----	126 IBLA 111 (Apr. 29, 1993)
189 -----	127 IBLA 163 (Aug. 27, 1993)
191 -----	128 IBLA 94 (Dec. 13, 1993)
201(b) -----	126 IBLA 357 (June 29, 1993)
207 -----	127 IBLA 297 (Oct. 7, 1993)
207(a) -----	123 IBLA 194A (Feb. 9, 1993)
	127 IBLA 297 (Oct. 7, 1993)
	127 IBLA 331, 100 I.D. 370 (1993)
207(b) -----	123 IBLA 194A (Feb. 9, 1993)
	127 IBLA 297 (Oct. 7, 1993)
209 -----	123 IBLA 194A (Feb. 9, (1993)
	125 IBLA 223 (Feb. 5, 1993)
	M-36911 (Supp. I), 100 I.D. 103 (1993)
223 -----	126 IBLA 117 (Apr. 29, 1993)
226 -----	23 IBIA 228 (Mar. 8, 1993)
	124 IBLA 287 (Feb. 26, 1993)
	125 IBLA 210 (Feb. 5, 1993)
	127 IBLA 125 (Aug. 24, 1993)
	127 IBLA 163 (Aug. 27, 1993)
226(a) (2) -----	127 IBLA 392 (Oct. 29, 1993)
226(b) -----	126 IBLA 111 (Apr. 29, 1993)
	126 IBLA 332 (June 16, 1993)
	M-36911 (Supp. I), 100 I.D. 103 (1993)
226(c) -----	126 IBLA 111 (Apr. 29, 1993)
	127 IBLA 70 (July 20, 1993)
226(e) -----	126 IBLA 101 (Apr. 21, 1993)
226(g) -----	125 IBLA 210 (Feb. 5, 1993)
226(h) -----	125 IBLA 210 (Feb. 5, 1993)
226(m) -----	127 IBLA 331, 100 I.D. 370 (1993)
261 -----	128 IBLA 36 (Nov. 16, 1993)
262 -----	128 IBLA 36 (Nov. 16, 1993)
	128 IBLA 99 (Dec. 20, 1993)
351-359 -----	125 IBLA 210 (Feb. 5, 1993)
	126 IBLA 124 (Apr. 29, 1993)
352 -----	125 IBLA 210 (Feb. 5, 1993)
	125 IBLA 279 (Oct. 5, 1993)
521-524 -----	M-36911 (Supp. I), 100 I.D. 103 (1993)
521-531 -----	M-36911 (Supp. I), 100 I.D. 103 (1993)
601 -----	127 IBLA 73 (July 20, 1993)

TITLE 30 (Cont.)

601-603 -----	125 IBLA 353 (Mar. 30, 1993)
601-604 -----	126 IBLA 134 (May 4, 1993)
601 <u>et seq.</u> -----	126 IBLA 269 (June 3, 1993)
612 -----	125 IBLA 296 (Mar. 16, 1993)
612(a) -----	125 IBLA 72 (Jan. 6, 1993)
	125 IBLA 296 (Mar. 16, 1993)
613 -----	126 IBLA 162 (May 10, 1993)
621 -----	125 IBLA 104 (Jan. 12, 1993)
	127 IBLA 211 (Sept. 14, 1993)
621(a) -----	125 IBLA 104 (Jan. 12, 1993)
621-625 -----	125 IBLA 104 (Jan. 12, 1993)
623 -----	127 IBLA 211 (Sept. 14, 1993)
1002 -----	126 IBLA 142 (May 6, 1993)
1201-1328 -----	125 IBLA 107 (Jan. 14, 1993)
	126 IBLA 191 (May 13, 1993)
	128 IBLA 1 (Nov. 2, 1993)
1201(b) -----	M-36971, 100 I.D. 85 (1993)
1202(b) -----	125 IBLA 271 (Feb. 19, 1993)
1202(k) -----	M-36971, 100 I.D. 85 (1993)
1253 -----	126 IBLA 310 (June 15, 1993)
1256(a) -----	126 IBLA 310 (June 15, 1993)
	126 IBLA 320 (June 16, 1993)
1257(b) (9) -----	125 IBLA 271 (Feb. 19, 1993)
1257(b) (13) -----	125 IBLA 107 (Jan. 14, 1993)
1260(b) -----	125 IBLA 107 (Jan. 14, 1993)
	125 IBLA 271 (Feb. 19, 1993)
1260(b) (1) -----	125 IBLA 107 (Jan. 14, 1993)
1260(b) (4) -----	125 IBLA 107 (Jan. 14, 1993)
1260(b) (6) -----	125 IBLA 271 (Feb. 19, 1993)
1265 -----	125 IBLA 369, 100 I.D. 63 (1993)
1265(b) (3) -----	126 IBLA 310 (June 16, 1993)
	126 IBLA 320 (June 16, 1993)
1265(b) (4) -----	M-36971, 100 I.D. 85 (1993)
1266 -----	M-36971, 100 I.D. 85 (1993)
1266(a) -----	M-36971, 100 I.D. 85 (1993)
1266(b) (1) -----	M-36971, 100 I.D. 85 (1993)
1266(b) (10) -----	M-36971, 100 I.D. 85 (1993)
1266(d) -----	M-36971, 100 I.D. 85 (1993)
1271 -----	125 IBLA 369, 100 I.D. 63 (1993)
1271(a) (1) -----	125 IBLA 271 (Feb. 19, 1993)
	126 IBLA 310 (June 15, 1993)
	126 IBLA 320 (June 16, 1993)
	127 IBLA 192 (Sept. 14, 1993)
	128 IBLA 1 (Nov. 2, 1993)
1271(a) (2) -----	126 IBLA 310 (June 15, 1993)
1271(a) (3) -----	127 IBLA 245 (Sept. 28, 1993)
	128 IBLA 1 (Nov. 2, 1993)
1271(b) -----	125 IBLA 369, 100 I.D. 63 (1993)
1272 -----	125 IBLA 107 (Jan. 14, 1993)
1272(a) -----	125 IBLA 107 (Jan. 14, 1993)
1272(b) -----	125 IBLA 107 (Jan. 14, 1993)

TITLE 30 (Cont.)

1272(e)	-----	M-36971,	100	I.D. 85 (1993)
1272(e) (5)	-----	125 IBLA	107	(Jan. 14, 1993)
1275	-----	126 IBLA	310	(June 15, 1993)
1275(c)	-----	127 IBLA	245	(Sept. 28, 1993)
1275(c) (3)	-----	125 IBLA	369,	100 I.D. 63 (1993)
1275(e)	-----	127 IBLA	245	(Sept. 28, 1993)
1276(a)	-----	125 IBLA	369,	100 I.D. 63 (1993)
1278(2)	-----	126 IBLA	191	(May 13, 1993)
		126 IBLA	320	(June 16, 1993)
		127 IBLA	86	(July 23, 1993)
1291(27)	-----	126 IBLA	320	(June 16, 1993)
1291(28)	-----	126 IBLA	320	(June 16, 1993)
		128 IBLA	1	(Nov. 2, 1993)
		M-36971,	100	I.D. 85 (1993)
1291(28) (a)	-----	M-36971,	100	I.D. 85 (1993)
1291(28) (B)	-----	126 IBLA	131	(May 13, 1993)
1307	-----	M-36971,	100	I.D. 85 (1993)
1701-1757	-----	125 IBLA	313	(Mar. 23, 1993)
1702(12)	-----	127 IBLA	265	(Sept. 28, 1993)
1719(c)	-----	128 IBLA	94	(Dec. 13, 1993)
1721	-----	125 IBLA	308	(Mar. 18, 1993)
1721(a)	-----	125 IBLA	313	(Mar. 23, 1993)
		125 IBLA	318	(Mar. 23, 1993)
1735	-----	126 IBLA	124	(Apr. 30, 1993)
		127 IBLA	125	(Aug. 24, 1993)
		127 IBLA	163	(Aug. 27, 1993)

TITLE 31:

sec. 665(a) ----- M-36974, 100 I.D. 195 (1993)
1322(b)(2) ----- M-36977, 100 I.D. 418 (1993)
3101(a) ----- M-36974, 100 I.D. 195 (1993)
3512 ----- 10 OHA 40 (June 30, 1993)
3717 ----- 125 IBLA 313 (Mar. 23, 1993)
3717(g)(2) ----- 125 IBLA 313 (Mar. 23, 1993)
3901-3906 ----- IBCA-3037, 100 I.D. 45 (1993)
3908 ----- IBCA-3037, 100 I.D. 45 (1993)

TITLE 41:

sec. 401 et seq. ----- M-36974, 100 I.D. 195 (1993)
403 ----- M-36974, 100 I.D. 195 (1993)
405(a) ----- M-36974, 100 I.D. 195 (1993)
601-613 ----- IBCA-3037, 100 I.D. 45 (1993)
602(a) ----- IBCA-3007, 100 I.D. 301 (1993)
605(c) ----- IBCA-2970, 100 I.D. 1 (1993)
605(c)(1) ----- IBCA-2970, 100 I.D. 1 (1993)
605(c)(5) ----- IBCA-2319, 100 I.D. 215 (1993)
611 ----- IBCA-3007, 100 I.D. 301 (1993)
IBCA-3108-F, 100 I.D. 321 (1993)

TITLE 42:

sec. 1983 -----	M-36978, 100 I.D. 431 (1993)
1988 -----	IBCA-3108-F, 100 I.D. 321 (1993)
2000e-5(k) -----	IBCA-3037, 100 I.D. 45 (1993)
2004a -----	24 IBIA 33 (May 28, 1993)
4321 -----	125 IBLA 52 (Jan. 5, 1993)
	126 IBLA 251 (June 1, 1993)
	127 IBLA 331, 100 I.D. 370 (1993)
4321-4370 -----	125 IBLA 52 (Jan. 5, 1993)
4321-4370a -----	125 IBLA 210 (Feb. 5, 1993)
4321-4370c -----	126 IBLA 142 (May 6, 1993)
4331 -----	125 IBLA 52 (Jan. 5, 1993)
4332 -----	126 IBLA 48 (Apr. 14, 1993)
4332(c) -----	128 IBLA 52 (Dec. 2, 1993)
4332(2)(c) -----	125 IBLA 52 (Jan. 5, 1993)
	125 IBLA 132 (Jan. 15, 1993)
	125 IBLA 210 (Feb. 5, 1993)
	126 IBLA 93 (Apr. 21, 1993)
	126 IBLA 142 (May 6, 1993)
	126 IBLA 304 (June 15, 1993)
	127 IBLA 282 (Oct. 7, 1993)
4601 -----	10 OHA 20 (May 18, 1993)
4601-4655 -----	10 OHA 1 (Apr. 27, 1993)
	10 OHA 20 (May 18, 1993)
	10 OHA 110 (Aug. 31, 1993)
4601(10) -----	10 OHA 110 (Aug. 31, 1993)
4601 <u>et seq.</u> -----	10 OHA 1 (Apr. 27, 1993)
	10 OHA 20 (May 18, 1993)
4601(6)(A)(i)(I) ----	10 OHA 36 (June 28, 1993)
4601(6)(B) -----	10 OHA 36 (June 28, 1993)
4622 -----	10 OHA 36 (June 28, 1993)
4622(a)(1) -----	10 OHA 1 (Apr. 27, 1993)
	10 OHA 20 (May 18, 1993)
4622(a)(2) -----	10 OHA 1 (Apr. 27, 1993)
	10 OHA 20 (May 18, 1993)
4622(c) -----	10 OHA 1 (Apr. 27, 1993)
	10 OHA 20 (May 18, 1993)
4623 -----	10 OHA 110 (Aug. 31, 1993)
4623(a)(1)(C) -----	10 OHA 110 (Aug. 31, 1993)
4626 -----	10 OHA 110 (Aug. 31, 1993)
4651(3) -----	M-36974, 100 I.D. 195 (1993)

TITLE 43:

sec. 2 -----	126 IBLA 281 (June 7, 1993)
	126 IBLA 361 (June 29, 1993)
52 -----	126 IBLA 361 (June 29, 1993)
141-143 -----	127 IBLA 375 (Oct. 21, 1993)
155 -----	127 IBLA 375 (Oct. 21, 1993)
155-158 -----	127 IBLA 375 (Oct. 21, 1993)

TITLE 43 (Cont.)

256a -----	125 IBLA 158 (Jan. 28, 1993)
270-1 -----	125 IBLA 235 (Feb. 11, 1993)
	126 IBLA 256 (June 2, 1993)
	126 IBLA 256 (June 2, 1993)
270-1-270-3 -----	125 IBLA 291 (Mar. 9, 1993)
	125 IBLA 235 (Feb. 11, 1993)
	125 IBLA 168 (May 11, 1993)
	126 IBLA 204 (May 20, 1993)
	126 IBLA 256 (June 2, 1993)
	126 IBLA 281 (June 7, 1993)
	127 IBLA 175 (Sept. 2, 1993)
	127 IBLA 196 (Sept. 14, 1993)
	127 IBLA 224 (Sept. 24, 1993)
	128 IBLA 130 (Dec. 30, 1993)
270-2 -----	125 IBLA 291 (Mar. 9, 1993)
270-3 -----	125 IBLA 235 (Feb. 11, 1993)
	126 IBLA 256 (June 2, 1993)
	127 IBLA 196 (Sept. 14, 1993)
	127 IBLA 224 (Sept. 24, 1993)
291 -----	23 IBIA 286 (Apr. 6, 1993)
	126 IBLA 269 (June 3, 1993)
291-298 -----	127 IBLA 395 (Nov. 2, 1993)
299 -----	23 IBIA 286 (Apr. 6, 1993)
315 -----	126 IBLA 8 (Apr. 1, 1993)
	126 IBLA 296 (June 14, 1993)
	127 IBLA 395 (Nov. 2, 1993)
315-315g-1 -----	125 IBLA 170 (Feb. 5, 1993)
315-315q -----	126 IBLA 238 (May 28, 1993)
315a -----	126 IBLA 111 (Apr. 27, 1993)
315a-315r -----	126 IBLA 8 (Apr. 1, 1993)
315b -----	125 IBLA 170 (Feb. 5, 1993)
	126 IBLA 8 (Apr. 1, 1993)
	126 IBLA 111 (Apr. 27, 1993)
	126 IBLA 238 (May 28, 1993)
315g -----	127 IBLA 105 (Aug. 9, 1993)
315h -----	126 IBLA 238 (May 28, 1993)
	127 IBLA 259 (Sept. 28, 1993)
315 <u>et seq.</u> -----	M-36972, 100 I.D. 163 (1993)
321 -----	125 IBLA 158 (Jan. 28, 1993)
	125 IBLA 165 (Jan. 28, 1993)
	126 IBLA 20 (Apr. 8, 1993)
321-323 -----	125 IBLA 165 (Jan. 28, 1993)
325 -----	125 IBLA 165 (Jan. 28, 1993)
327-329 -----	125 IBLA 165 (Jan. 28, 1993)
328 -----	125 IBLA 158 (Jan. 28, 1993)
	125 IBLA 165 (Jan. 28, 1993)
	126 IBLA 20 (Apr. 8, 1993)
329 -----	125 IBLA 158 (Jan. 28, 1993)
	125 IBLA 165 (Jan. 28, 1993)
	126 IBLA 20 (Apr. 8, 1993)
333 -----	125 IBLA 158 (Jan. 28, 1993)

TITLE 43 (Cont.)

334 -----	125 IBLA 158 (Jan. 28, 1993)
336 -----	125 IBLA 158 (Jan. 28, 1993)
336a -----	125 IBLA 158 (Jan. 28, 1993)
597 -----	M-36973, 100 I.D. 185 (1993)
620 -----	128 IBLA 99 (Dec. 20, 1993)
661 -----	128 IBLA 43 (Dec. 1, 1993)
666 -----	M-36973, 100 I.D. 185 (1993)
687a -----	125 IBLA 335 (Mar. 29, 1993)
	M-36911 (Supp. I), 100 I.D. 103 (1993)
687a-1 -----	125 IBLA 335 (Mar. 29, 1993)
687a-2-687a-5 -----	M-36911 (Supp. I), 100 I.D. 103 (1993)
693-697 -----	127 IBLA 307 (Oct. 7, 1993)
732 -----	128 IBLA 13 (Nov. 3, 1993)
735 -----	127 IBLA 13 (Nov. 3, 1993)
751 -----	126 IBLA 361 (June 29, 1993)
751-753 -----	126 IBLA 361 (June 29, 1993)
772 -----	126 IBLA 361 (June 29, 1993)
869-869-4 -----	127 IBLA 145 (Aug. 25, 1993)
932 -----	127 IBLA 325 (Oct. 14, 1993)
942-1 -----	127 IBLA 137 (Aug. 25, 1993)
942-1-942-9 -----	M-36911 (Supp. I), 100 I.D. 103 (1993)
959 -----	125 IBLA 262 (Feb. 17, 1993)
1061 -----	126 IBLA 101 (Apr. 21, 1993)
1068 -----	125 IBLA 143 (Jan. 15, 1993)
	125 IBLA 230 (Feb. 11, 1993)
	125 IBLA 247 (Feb. 11, 1993)
	125 IBLA 255 (Feb. 16, 1993)
	127 IBLA 47 (July 15, 1993)
1068(b) -----	125 IBLA 230 (Feb. 11, 1993)
1161 -----	125 IBLA 335 (Mar. 29, 1993)
1164 -----	125 IBLA 335 (Mar. 29, 1993)
1181a -----	126 IBLA 93 (Apr. 21, 1993)
	127 IBLA 379 (Oct. 27, 1993)
1181f -----	127 IBLA 379 (Oct. 27, 1993)
1301-1315 -----	M-36911 (Supp. I), 100 I.D. 103 (1993)
	127 IBLA 317 (Oct. 13, 1993)
1301(f) -----	M-36911 (Supp. I), 100 I.D. 103 (1993)
1311(a) -----	M-36911 (Supp. I), 100 I.D. 103 (1993)
1312 -----	M-36911 (Supp. I), 100 I.D. 103 (1993)
1313 -----	127 IBLA 317 (Oct. 13, 1993)
1313(a) -----	127 IBLA 317 (Oct. 13, 1993)
	M-36911 (Supp. I), 100 I.D. 103 (1993)

TITLE 43 (Cont.)

1313(b) -----	M-36911 (Supp. I), 100 I.D. 103 (1993)
1313(c) -----	M-36911 (Supp. I), 100 I.D. 103 (1993)
1314 -----	M-36911 (Supp. I), 100 I.D. 103 (1993)
1314(b) -----	M-36911 (Supp. I), 100 I.D. 103 (1993)
1334(a) -----	M-36977, 100 I.D. 418 (1993)
1337(a) (1) (A) -----	M-36977, 100 I.D. 418 (1993)
1337(g) -----	127 IBLA 220 (Sept. 23, 1993) M-36977, 100 I.D. 418 (1993)
1338 -----	M-36977, 100 I.D. 418 (1993)
1339 -----	127 IBLA 96 (July 27, 1993) 127 IBLA 220 (Sept. 23, 1993) M-36977, 100 I.D. 418 (1993)
1339(a) -----	127 IBLA 96 (July 27, 1993) 128 IBLA 94 (Dec. 13, 1993)
1353 -----	M-36977, 100 I.D. 418 (1993)
1601-29a -----	127 IBLA 317 (Oct. 13, 1993)
1601 <u>et seq.</u> -----	M-36911 (Supp. I), 100 I.D. 103 (1993) M-36972, 100 I.D. 163 (1993) 9 OHA 239, 100 I.D. 75 (1993) Sol. Memo, 100 I.D. 4 (1993)
1602 -----	128 IBLA 119 (Dec. 22, 1993)
1602(e) -----	127 IBLA 317 (Oct. 13, 1993) M-36972, 100 I.D. 163 (1993)
1603(a) -----	M-36972, 100 I.D. 163 (1993)
1610 -----	125 IBLA 335 (Mar. 29, 1993) 127 IBLA 22 (July 15, 1993)
1610(a) -----	128 IBLA 119 (Dec. 22, 1993)
1610(a) (1) -----	M-36972, 100 I.D. 163 (1993)
1610(a) (1) (A) -----	M-36972, 100 I.D. 163 (1993)
1610(a) (2) -----	128 IBLA 119 (Dec. 22, 1993)
1610(a) (3) (A) -----	M-36972, 100 I.D. 163 (1993)
1611 -----	125 IBLA 335 (Mar. 29, 1993) 128 IBLA 119 (Dec. 22, 1993) M-36972, 100 I.D. 163 (1993)
1611(a) -----	128 IBLA 119 (Dec. 22, 1993)
1611(a) (1) -----	M-36972, 100 I.D. 163 (1993)
1611(a) (2) -----	128 IBLA 119 (Dec. 22, 1993)
1611(b) -----	M-36972, 100 I.D. 163 (1993)
1613(a) -----	M-36972, 100 I.D. 163 (1993)
1613(b) (8) (B) -----	127 IBLA 22 (July 15, 1993)
1613(c) (1)-(4) -----	M-36972, 100 I.D. 163 (1993)
1613(f) -----	128 IBLA 119 (Dec. 22, 1993)
1613(h) (1) -----	126 IBLA 383 (July 6, 1993) 127 IBLA 22 (July 15, 1993) 127 IBLA 40 (July 15, 1993) 127 IBLA 59 (July 20, 1993)

TITLE 43 (Cont.)

1615 -----	127 IBLA 22 (July 15, 1993)
	M-36972, 100 I.D. 163 (1993)
1616(b) -----	125 IBLA 204 (May 20, 1993)
1616(c) -----	M-36972, 100 I.D. 163 (1993)
1616(d)(1) -----	M-36972, 100 I.D. 163 (1993)
1616(d)(2) -----	M-36972, 100 I.D. 163 (1993)
1616(j) -----	M-36972, 100 I.D. 163 (1993)
1617 -----	127 IBLA 196 (Sept. 14, 1993)
	127 IBLA 224 (Sept. 24, 1993)
1617(a) -----	125 IBLA 235 (Feb. 11, 1993)
	126 IBLA 168 (May 11, 1993)
	126 IBLA 204 (May 20, 1993)
	126 IBLA 256 (June 2, 1993)
	126 IBLA 281 (June 7, 1993)
	127 IBLA 137 (Aug. 25, 1993)
	127 IBLA 175 (Sept. 2, 1993)
	128 IBLA 130 (Dec. 30, 1993)
	Sol. Memo, 100 I.D. 4 (1993)
1617(a) -----	9 OHA 239, 100 I.D. 75 (1993)
1618 -----	M-36972, 100 I.D. 163 (1993)
1618(a) -----	127 IBLA 1 (July 12, 1993)
1621(j) -----	126 IBLA 281 (June 7, 1993)
	M-36972, 100 I.D. 163 (1993)
1621(j)(2) -----	M-36972, 100 I.D. 163 (1993)
1631 -----	M-36911 (Supp. I), 100 I.D. 103 (1993)
	M-36972, 100 I.D. 163 (1993)
1632(a) -----	126 IBLA 281 (June 7, 1993)
1634 -----	126 IBLA 168 (May 11, 1993)
	126 IBLA 281 (June 7, 1993)
	127 IBLA 196 (Sept. 14, 1993)
1634(a) -----	126 IBLA 168 (May 11, 1993)
	126 IBLA 281 (June 7, 1993)
1634(a)(1) -----	125 IBLA 235 (Feb. 11, 1993)
1634(a)(1)(B) -----	126 IBLA 168 (May 11, 1993)
1634(a)(4) -----	125 IBLA 235 (Feb. 11, 1993)
1634(a)(5) -----	126 IBLA 281 (June 7, 1993)
1634(a)(5)(A) -----	126 IBLA 281 (June 7, 1993)
1634(a)(5)(B) -----	126 IBLA 168 (May 11, 1993)
	126 IBLA 204 (May 20, 1993)
	9 OHA 239, 100 I.D. 75 (1993)
	Sol. Memo, 100 I.D. 4 (1993)
1634(a)(5)(C) -----	126 IBLA 168 (May 11, 1993)
	126 IBLA 281 (June 7, 1993)
1634(b) -----	127 IBLA 175 (Sept. 2, 1993)
1634(c) -----	126 IBLA 168 (May 11, 1993)
	126 IBLA 281 (June 7, 1993)
	127 IBLA 156 (Aug. 26, 1993)
	127 IBLA 196 (Sept. 14, 1993)
	128 IBLA 130 (Dec. 30, 1993)

TITLE 43 (Cont.)

1635(e) -----	9 OHA 239, 100 I.D. 75 (1993) Sol. Memo, 100 I.D. (1993)
1635(o)(1) -----	M-36972, 100 I.D. 163 (1993)
1635(p) -----	M-36911 (Supp. I), 100 I.D. 103 (1993)
1639 -----	M-36972, 100 I.D. 163 (1993)
1701(a)(5) -----	127 IBLA 50 (July 20, 1993)
1702(c) -----	126 IBLA 111 (Apr. 27, 1993)
1712(e) -----	126 IBLA 304 (June 15, 1993)
1713 -----	126 IBLA 174 (May 11, 1993)
1714 -----	127 IBLA 375 (Oct. 21, 1993)
1714(e) -----	M-36972, 100 I.D. 163 (1993)
1715(e) -----	127 IBLA 379 (Oct. 27, 1993)
1716 -----	125 IBLA 153 (Jan. 21, 1993) 127 IBLA 379 (Oct. 27, 1993) 128 IBLA 17 (Nov. 4, 1993) M-36974, 100 I.D. 195 (1993)
1716(a) -----	127 IBLA 379 (Oct. 27, 1993)
1716(b) -----	128 IBLA 17 (Nov. 4, 1993)
1732 -----	126 IBLA 101 (Apr. 21, 1993) 126 IBLA 251 (June 1, 1993) 126 IBLA 269 (June 3, 1993) 126 IBLA 353 (June 29, 1993) 127 IBLA 375 (Oct. 21, 1993) 127 IBLA 331, 100 I.D. 370 (1993)
1732(a) -----	125 IBLA 170 (Feb. 5, 1993)
1732(b) -----	125 IBLA 72 (Jan. 6, 1993) 126 IBLA 1 (Apr. 1, 1993) 126 IBLA 48 (Apr. 14, 1993) 126 IBLA 222 (May 21, 1993) 126 IBLA 251 (June 1, 1993) 127 IBLA 331, 100 I.D. 370 (1993) 128 IBLA 72 (Dec. 7, 1993)
1732(c) -----	127 IBLA 145 (Aug. 25, 1993)
1733 -----	126 IBLA 251 (June 1, 1993)
1740 -----	126 IBLA 174 (May 11, 1993) 126 IBLA 353 (June 29, 1993)
1744 -----	127 IBLA 18 (July 13, 1993) 127 IBLA 73 (July 20, 1993) 127 IBLA 211 (Sept. 14, 1993) 128 IBLA 26 (Nov. 16, 1993) 128 IBLA 77 (Dec. 7, 1993) 128 IBLA 84 (Dec. 10, 1993)
1744(a) -----	127 IBLA 73 (July 20, 1993)
1744(b) -----	125 IBLA 104 (Jan. 12, 1993) 127 IBLA 73 (July 20, 1993) 127 IBLA 217 (Sept. 21, 1993) 127 IBLA 395 (Nov. 2, 1993)
1744(c) -----	127 IBLA 73 (July 20, 1993) 128 IBLA 77 (Dec. 7, 1993)
1744(2)(c) -----	127 IBLA 270 (Oct. 1, 1993)

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TITLE 43 (Cont.)

1746 -----	127 IBLA 307 (Oct. 7, 1993)
1751-1753 -----	126 IBLA 111 (Apr. 27, 1993)
1752(a) -----	126 IBLA 238 (May 28, 1993)
1761 -----	125 IBLA 317 (Mar. 25, 1993)
	125 IBLA 326 (Mar. 25, 1993)
	126 IBLA 256 (June 2, 1993)
	127 IBLA 101 (July 29, 1993)
	127 IBLA 375 (Oct. 21, 1993)
	128 IBLA 43 (Dec. 1, 1993)
	128 IBLA 126 (Dec. 22, 1993)
1761-1771 -----	125 IBLA 132 (Jan. 15, 1993)
	125 IBLA 262 (Feb. 17, 1993)
	126 IBLA 349 (June 25, 1993)
	127 IBLA 313 (Oct. 12, 1993)
1761(a) -----	125 IBLA 132 (Jan. 15, 1993)
	125 IBLA 262 (Feb. 17, 1993)
	127 IBLA 375 (Oct. 21, 1993)
1761(a)(1) -----	128 IBLA 43 (Dec. 1, 1993)
1761(a)(5) -----	126 IBLA 174 (May 11, 1993)
1761(a)(6) -----	127 IBLA 101 (July 29, 1993)
1761(a)(7) -----	127 IBLA 375 (Oct. 21, 1993)
1764(g) -----	125 IBLA 326 (Mar. 25, 1993)
	125 IBLA 262 (Feb. 17, 1993)
	126 IBLA 174 (May 11, 1993)
	127 IBLA 101 (July 29, 1993)
	127 IBLA 313 (Oct. 12, 1993)
1766 -----	126 IBLA 335 (June 17, 1993)
	127 IBLA 145 (Aug. 25, 1993)
1770 -----	126 IBLA 256 (June 2, 1993)
	128 IBLA 43 (Dec. 1, 1993)
1782 -----	125 IBLA 175, 100 I.D. 14 (1993)
	126 IBLA 232 (May 27, 1993)
	127 IBLA 331, 100 I.D. 370 (1993)
1782(a) -----	128 IBLA 43 (Dec. 1, 1993)
1782(c) -----	125 IBLA 175, 100 I.D. 14 (1993)
	127 IBLA 331, 100 I.D. 370 (1993)
	128 IBLA 43 (Dec. 1, 1993)
4321 -----	126 IBLA 238 (May 28, 1993)
4601-4653 -----	10 OHA 98 (July 22, 1993)

TITLE 44:

sec. 1507 -----	127 IBLA 101 (July 29, 1993)
	10 OHA 98 (July 22, 1993)
1510 -----	10 OHA 98 (July 22, 1993)

TITLE 48:

sec. 321a -----	127 IBLA 137 (Aug. 25, 1993)
321a-321c -----	127 IBLA 137 (Aug. 25, 1993)
322 -----	127 IBLA 137 (Aug. 25, 1993)

TITLE 48 (Cont.)

324 ----- 127 IBLA 137 (Aug. 25, 1993)
511 ----- M-36978, 100 I.D. 431 (1993)
691 ----- M-36978, 100 I.D. 431 (1993)

ACQUIRED LANDS

The land acquisitions in question are not subject to the requirements of so-called procurement laws. However, specific actions related to land acquisition may provide bureaus with an opportunity to contract certain functions.

Generally, the bureaus have the authority to pay in excess of appraisal values for property acquired.

Inspector General's Report on Land Acquisitions, M-36974
(July 30, 1992) 100 I.D. 195

ACT OF JULY 26, 1866

The appeal of an administrative determination by BLM that a road is a R.S. 2477 right-of-way will be dismissed for lack of standing where the appellant makes no colorable allegation of adverse effect. That a group's organizational interest in protection of the public lands, which its members utilize, might be adversely affected by a BLM action is not subject to dispute. However, the group may not rely on that general organizational interest alone in challenging a BLM action. It must identify how the particular BLM action in question actually adversely affects its interest.

Southern Utah Wilderness Alliance, 127 IBLA 325
(Oct. 14, 1993)

ACT OF FEBRUARY 8, 1887

BLM properly rejected an application under sec. 4 of the Indian General Allotment Act, as amended, 25 U.S.C. § 334 (1988), for an Indian allotment when the applicant failed to provide, either with her application or in response to a BLM decision requiring her to do so, a certificate of eligibility showing that she is or is entitled to be a recognized member of a Federally recognized Indian tribe.

Ramona L. Randa, 125 IBLA 153 (Jan. 21, 1993)

ACT OF MARCH 13, 1921

A right to select lieu lands under the authority of sec. 13 of the Act of Mar. 13, 1921, 41 Stat. 1239, was a claim required to be recorded with the Department within 2 years from the effective date of the Act of Aug. 5, 1955, 69 Stat. 534. Failure to present the claim within the time established by the 1955 Recordation Act barred acquisition of the land. Filing a selection application in 1946 did not constitute compliance with the 1955 recordation requirement.

Tommy Chavez, 127 IBLA 395 (Nov. 2, 1993)

ACT OF JUNE 9, 1921

The Hawaiian Homes Commission Act of 1920, 42 Stat. 108, as amended (HHCA), established neither a trust corpus nor a beneficial owner, both of which are essential elements of a common law trust. The HHCA simply made lands available for homesteading on a limited basis.

The HHCA did not create a fiduciary responsibility in any party, the United States, the Territory of Hawaii, or the State of Hawaii.

The duties the HHCA placed in the Secretary of the Interior and in the Territory of Hawaii are not those of a trustee. Price v. Hawaii, 921 F.2d 950, 955 (9th Cir. 1990). They are, rather, those of a Government administrator.

The Scope of Federal Responsibility for Native Hawaiians Under the Hawaiian Homes Commission Act, M-36978
(Jan. 19, 1993) 100 I.D. 431

ACT OF NOVEMBER 9, 1921

That portion of a mining claim located on land subject to a pre-existing highway right-of-way granted to the State of California pursuant to the Federal Highway Act of Nov. 9, 1921, 42 Stat. 212, now the Federal Aid Highway Act, 23 U.S.C. § 317 (1988), is null and void ab initio.

Jesse R. Collins et al., 127 IBLA 122 (Aug. 23, 1993)

ACT OF AUGUST 5, 1955

A right to select lieu lands under the authority of sec. 13 of the Act of Mar. 13, 1921, 41 Stat. 1239, was a claim required to be recorded with the Department within 2 years from the effective date of the Act of Aug. 5, 1955, 69 Stat. 534. Failure to present the claim within the time established by the 1955 Recordation Act barred acquisition of the land. Filing a selection application in 1946 did not constitute compliance with the 1955 recordation requirement.

Tommy Chavez, 127 IBLA 395 (Nov. 2, 1993)

ADMINISTRATIVE AUTHORITY

(See also Delegation of Authority, Federal Employees & Officers, Secretary of the Interior)

GENERALLY

Under the provisions of 43 CFR 3101.7-3, a third-party objecting to issuance of an oil and gas lease on land within the National Forest System, pursuant to the consent of the FS, has standing to appeal to the Interior Board of Land Appeals. However, to the extent that the third-party raises objections to the conformity of actions undertaken by the FS with respect to its own

ADMINISTRATIVE AUTHORITY--Continued

GENERALLY--Continued

internal operating procedures or with laws solely applicable to the FS, the Board will not review such contentions where the FS has provided its own appeal system for the resolution of such issues.

Colorado Environmental Coalition, 125 IBLA 210 (Feb. 5, 1993)

A statute establishing time limitations for the commencement of judicial actions for damages on behalf of the U.S. does not limit administrative proceedings within the DOI.

Bolling Construction Co. & Bob Bolling, 125 IBLA 303 (Mar. 16, 1993)

Quality Broadcasting Corp., Unicom Broadcasting, Inc., 126 IBLA 174 (May 11, 1993)

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does

ADMINISTRATIVE AUTHORITY--Continued

GENERALLY--Continued

not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

An interim conveyance is similar to a patent in that it conveys legal title to the land described. In the absence of legal title, DOI lacks jurisdiction to adjudicate entitlement of an applicant for a tract of land. Where the applicant is a Native American, the fiduciary duty of DOI may justify a review of the application to determine whether to seek reconveyance of the land.

With respect to lands which have been conveyed out of Federal ownership, a decision accepting a Native allotment application as amended is not an adversarial adjudication of entitlement of the applicant to an allotment which is dispositive of the rights of the applicant or adverse parties since DOI lacks jurisdiction to make such a ruling in the absence of legal title. In this context, an appeal by an adverse party is properly dismissed as premature. If the land is reconveyed, any decision adjudicating the amended location will be subject to appeal.

Bay View, Inc., 126 IBLA 281 (June 7, 1993)

In order to correct prior error, an official of the BIA may change an administrative interpretation of a statute as long as the reason for the change is clearly

ADMINISTRATIVE AUTHORITY--Continued

GENERALLY--Continued

set forth to show that the departure from the prior administrative position is not arbitrary or capricious.

Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 169 (Aug. 31, 1993)

A statute establishing time limitations for commencement of judicial actions for damages on behalf of the U.S. does not limit administrative proceedings within the DOI to recover indebtedness from an oil and gas operator.

CCCo., 127 IBLA 291 (Oct. 7, 1993)

The Secretary of the Interior and those authorized to act on his behalf have the discretionary authority to suspend operations and production under any oil or gas lease for conservation purposes, including the prevention of environmental damage. Where the record indicates that an EA prepared for drilling operations on an oil and gas lease located within both a ESA and an area of critical environmental concern failed to consider this option in evaluating the proposal to drill, the decision approving drilling operations will be set aside and the case will be remanded to permit consideration of whether, under this discretionary authority, operations under the lease should be suspended.

Since no express or implied rights of access arise upon issuance of a Federal oil and gas lease, the approval of the committal of a pre-FLPMA lease to a unit plan subsequent to the adoption of sec. 603(c) of FLPMA does not alter the application of the nonimpairment standard in determining whether access to the lease across other lands within the unit may be permitted.

Southern Utah Wilderness Alliance et al., 127 IBLA 331 (Oct. 19, 1993) 100 I.D. 370

ADMINISTRATIVE AUTHORITY--Continued

GENERALLY--Continued

IBLA has no authority to declare sec. 10(a) of OCSLA, 43 U.S.C. § 1339(a) (1988), or any other act of Congress unconstitutional. If an enactment of Congress is in conflict with the U.S. Constitution, it is for the Judicial Branch to so declare.

Amerada Hess Corp., 128 IBLA 94 (Dec. 13, 1993)

When a U.S. Court of Appeals held that lands selected by and approved for conveyance to the State of Alaska under the Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (July 28, 1956), were lands "selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act" and were properly withdrawn for Native village selection under 43 U.S.C. § 1610(a)(2) (1988), the doctrine of the law of the case compelled affirmation of a BLM decision on judicial remand implementing the court's decision.

Vern T. Weiss et al., 128 IBLA 119 (Dec. 22, 1993)

ESTOPPEL

When BLM has indicated to a trespasser that gravel extraction operations may continue, there is no basis for concluding that the continued operations were unreasonable or lacked good faith. Absent evidence showing knowledge that the violation is occurring or a reckless disregard for whether a violation is occurring, there is no justification for imposing what are essentially punitive damages for willful trespass. In such a case the Board will find, in the interest of fundamental fairness, that BLM is precluded from charging that the operator, who remained in trespass with permission to

ADMINISTRATIVE AUTHORITY--Continued

ESTOPPEL--Continued

continue operations, but absent formal authorization, was in willful trespass.

Richard Connie Nielson v. The Bureau of Land Management, 125 IBLA 353 (Mar. 30, 1993)

Circumstances may exist where the Government can be estopped because a private party, acting in reliance upon Governmental conduct, was prevented from obtaining a right which might have been otherwise obtained. However, the Government can never be estopped if the effect of invoking estoppel would grant a right which was not available in the first instance.

Edgar Sebastian Roberts, 127 IBLA 217 (Sept. 21, 1993)

ADMINISTRATIVE PRACTICE

Although OHA does not have authority to review the merits of biological opinions issued by the U.S. Fish & Wildlife Service under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), it has jurisdiction over an appeal from the rejection by BLM of an application for a right-of-way on the grounds that the right-of-way would destroy a Category 1 candidate species of plant and its habitat.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

ADMINISTRATIVE PRACTICE--Continued

Although authorized under 43 CFR 4.415, a fact-finding hearing will be ordered only when the record before the Board presents conflicting issues of fact that cannot be resolved on the basis of that record. Where appellant fails to submit all available evidence to the Board, it is not possible to conclude that the evidence is irreconcilable, and the request for hearing is properly denied.

Pine Grove Farms, 126 IBLA 269 (June 3, 1993)

OHA does not have authority to review the merits of biological opinions issued by the U.S. FWS under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988); however, an appellant's arguments concerning consistency with a biological opinion would normally be subject to review.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

ADMINISTRATIVE PROCEDURE

(See also Appeals, Confidential Information, Contests & Protests, Hearings, Judicial Review, Public Records, Regulations, Rules of Practice)

GENERALLY

The time limits for protesting a proposed decision under 43 CFR 4160.2 and for filing an appeal of a final decision under 43 CFR 4160.3 and 4160.4 are mandatory. If a proposed decision is not protested within 15 days after it is received, it becomes a final decision without further notice and is then subject to appeal for 30 days.

William J. Thoman v. Bureau of Land Management, 125 IBLA 100 (Jan. 8, 1993)

ADMINISTRATIVE PROCEDURE--Continued

GENERALLY--Continued

Even in the case of a decision based on the exercise of discretion, BIA has a responsibility to explain the rationale and factual basis of the decision.

ZCA Gas Gathering, Inc. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 23 IBIA 228 (Mar. 8, 1993)

Except as otherwise provided by law or other pertinent regulation, a decision issued before Feb. 18, 1993, will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. It is not necessary to seek a stay of a decision issued prior to Feb. 18, 1993, which is not automatically effective by law or pertinent regulation, and a request for an extension of time in which to file a stay request will be denied.

Committee for Idaho's High Desert, 123 IBLA 301 (Mar. 16, 1993)

Even in the case of a decision based on the exercise of discretionary authority, the BIA has a responsibility to explain the rationale and factual basis of the decision.

Kaw Nation v. Anadarko Area Director, Bureau of Indian Affairs, 24 IBIA 21 (May 26, 1993)

ADMINISTRATIVE PROCEDURE--Continued

GENERALLY--Continued

An appeal from a BLM decision to issue a land-use permit is dismissed when the permit applicant attacks the permit on the ground that title to the permitted land is not held by the U.S., but is instead owned by the applicant. The application for a land-use permit was an admission by the applicant that the land sought was public land.

Lawrence Smart Trust, 127 IBLA 55 (July 20, 1993)

The failure to file a SOR subjects an appeal to summary dismissal. 43 CFR 4.402(a). If no SOR or reason for the failure to file a SOR is filed, the appeal is properly dismissed.

Dvorak Expeditions et al., 127 IBLA 145 (Aug. 25, 1993)

ADJUDICATION

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative

ADMINISTRATIVE PROCEDURE--Continued

ADJUDICATION--Continued

review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

ADMINISTRATIVE LAW JUDGES

Although OHA does not have authority to review the merits of biological opinions issued by the U.S. Fish & Wildlife Service under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), it has jurisdiction over an appeal from the rejection by BLM of an application for a right-of-way on the grounds that the right-of-way would destroy a Category 1 candidate species of plant and its habitat.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE LAW JUDGES--Continued

(1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

ADMINISTRATIVE PROCEDURE ACT

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE PROCEDURE ACT--Continued

not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

Where a policy to restrict the offset of royalty overpayments against underpayments is the product of adjudication, the notice and comment procedures of 5 U.S.C. § 553 (1988), are not required.

Union Exploration Partners, Ltd., 127 IBLA 220 (Sept. 23, 1993)

The hearing before an ALJ provided by 43 CFR 4.470 for grazing appeals is authorized by sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988). This hearing is deemed to be a hearing "on the record" as provided by 5 U.S.C. § 554(a) (1988). The standard of proof at such a hearing is a preponderance of the evidence.

Ralph & Beverly Eason v. Bureau of Land Management, 127 IBLA 259 (Sept. 28, 1993)

ADMINISTRATIVE RECORD

When the administrative record and the decision in an appeal from a BIA Area Director's decision are inadequate to support the decision, the decision will

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE RECORD--Continued

be vacated and the case remanded for development of an adequate record and issuance of a new decision.

White Earth Band of Chippewa Indians v. Minneapolis Area Director, Bureau of Indian Affairs, 23 IBIA 216 (Mar. 3, 1993)

When the administrative record in an appeal from a BIA Area Director's decision is inadequate to support the decision, the decision will be vacated and the case remanded for development of an adequate record and issuance of a new decision.

ZCA Gas Gathering, Inc. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 23 IBIA 228 (Mar. 8, 1993)

The regulations in 25 CFR Part 2 do not require a BIA Area Director, before whom an appeal is pending, to provide advance notice that he expects to address an issue not decided by the Superintendent or raised by the parties. However, when resolution of the new issue depends upon facts which may not be reflected in the record as originally constituted, the Area Director has an obligation to seek out any additional relevant documents and to advise the parties, in accordance with 25 CFR 2.21(b), that he intends to consider them.

Lower Peoples Creek Cooperative v. Acting Billings Area Director, Bureau of Indian Affairs, 23 IBIA 297 (Apr. 22, 1993)

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW

Although OHA does not have authority to review the merits of biological opinions issued by the U.S. Fish & Wildlife Service under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), it has jurisdiction over an appeal from the rejection by BLM of an application for a right-of-way on the grounds that the right-of-way would destroy a Category 1 candidate species of plant and its habitat.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

Where, in an appeal of a decision to issue an outfitter and guide permit to a third party for the 1990 season, the appellant seeks to raise issues relating to the original issuance in 1987 of such a permit to the third party in 1987, such a challenge is barred by the doctrine of administrative finality.

Keith Rush dba Rush's Lakeview Ranch, Kevin Rush,
125 IBLA 346 (Mar. 29, 1993)

An appraisal will not be set aside unless an appellant shows error in the method of appraisal or shows by convincing evidence that the charges are excessive. When the decision of an ALJ does not clearly apply to this standard, the Board will review the evidence and the arguments of the parties to determine whether the result reached should be considered erroneous.

Richard Connie Nielson v. The Bureau of Land Management,
125 IBLA 353 (Mar. 30, 1993)

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

An appeal from a BLM decision to issue a land-use permit is dismissed when the permit applicant attacks the permit on the ground that title to the permitted land is not held by the U.S., but is instead owned by the applicant. The application for a land-use permit was an admission by the applicant that the land sought was public land.

Lawrence Smart Trust, 127 IBLA 55 (July 20, 1993)

OHA does not have authority to review the merits of biological opinions issued by the U.S. FWS under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988); however, an appellant's arguments concerning consistency with a biological opinion would normally be subject to review.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

BURDEN OF PROOF

A party appealing from a BLM decision has the burden of establishing error in the decision under appeal, and conclusory allegations of error, standing alone, do not discharge this burden.

Nat'l Park Service (Stuart G. Ramstad), 125 IBLA 335 (Mar. 29, 1993)

ADMINISTRATIVE PROCEDURE--Continued

BURDEN OF PROOF--Continued

An appraiser's training and experience are properly considered in determining the weight to be given testimony. When an appraisal lacks an analysis showing why a specific value was selected from a range of values, the ALJ who presides at a hearing is in the best position to decide the weight to be accorded the appraiser's testimony.

Richard Connie Nielson v. The Bureau of Land Management,
125 IBLA 353 (Mar. 30, 1993)

In cases arising under 25 CFR 2.8, challenging the failure of a BIA official to issue a decision, the burden is on the Bureau either to show that the failure was justified or to present and support a position that the official could have taken.

United Auburn Indian Community v. Sacramento Area
Director, Bureau of Indian Affairs, 24 IBIA 33 (May 28,
1993)

BLM's determination of the volume of material removed in trespass is properly affirmed where it is amply supported by the record, where BLM has supported its conclusions with a thorough exposition of its methodology, and where the appellant fails to establish error in the methodology BLM used to collect data and its interpretation of that data to determine the amount of material removed from the site. Appellant's anecdotal evidence concerning observations of conditions at the site is insufficient to overcome BLM's documented survey of those conditions.

Pine Grove Farms, 126 IBLA 269 (June 3, 1993)

ADMINISTRATIVE PROCEDURE--Continued

BURDEN OF PROOF--Continued

A party challenging BLM's rejection of its historical place selection application under sec. 14(h)(1) of ANCSA bears the burden of establishing by a preponderance of the evidence that such rejection is in error.

Sealaska Corp., 127 IBLA 22 (July 15, 1993)

A party challenging BLM's rejection of its historical place selection application under sec. 14(h)(1) of ANCSA, 43 U.S.C. § 1613(h)(1) (1988), bears the burden of establishing by a preponderance of the evidence that such rejection is in error.

Sealaska Corp., 127 IBLA 59 (July 20, 1993)

DECISIONS

In determining whether a change in law or in the interpretation of law should be given retroactive effect, the Board of Indian Appeals will consider: (1) the nature of the reliance placed upon the prior applications of law by the parties; (2) the harm or prejudice to those who relied upon previous principles of law; (3) the purpose of the law in light of public policy; and (4) the harm to the administration of justice or public purpose.

Severo Leon et al. v. Albuquerque Area Director, Bureau of Indian Affairs, 23 IBIA 248 (Mar. 23, 1993)

ADMINISTRATIVE PROCEDURE--Continued

HEARINGS

Where the record raises a question of fact regarding whether an individual, charged by BLM under 43 CFR 2920.1-2(a) with the costs of removing structures allegedly placed in trespass on public lands, was responsible for their construction or use, the case will be referred for a hearing on that question.

John H. Peterson, 125 IBLA 267 (Feb. 17, 1993)

In referring a case for a hearing, the Board will normally identify the subject matter and one or more issues. Such instructions do not preclude an ALJ from receiving evidence on and considering all relevant matters. The fact the Board does not comment on or rule upon all aspects of a case when referring it for a hearing does not mean that they are accepted as correct or made the law of the case.

Richard Connie Nielson v. The Bureau of Land Management, 125 IBLA 353 (Mar. 30, 1993)

Although the Board has discretionary authority to order a hearing before an ALJ pursuant to 43 CFR 4.415, a hearing is necessary only when there is a material issue of fact requiring resolution through the introduction of testimony and other evidence.

Vanderbilt Gold Corp., 126 IBLA 72 (Apr. 19, 1993)

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of

ADMINISTRATIVE PROCEDURE--Continued

HEARINGS--Continued

those facts, and BLM properly reviewed the same information submitted to this Board.

Sealaska Corp., 127 IBLA 22 (July 15, 1993)

Sealaska Corp., 127 IBLA 59 (July 20, 1993)

If the applicable statute does not expressly require a formal evidentiary hearing "on the record" and no contrary Congressional intent is evident, formal proceedings before an ALJ are not mandated. The language of 43 U.S.C. § 1732(c) (1988), allowing for revocation or suspension of a special recreation use permit after "notice and hearing," does not dictate a formal hearing before an ALJ, and a special recreation permittee's hearing rights under 43 U.S.C. § 1732(c) (1988), are satisfied when the permittee is given notice of BLM's adverse decision and afforded the right to appeal to the Interior Board of Land Appeals.

Dvorak Expeditions et al., 127 IBLA 145 (Aug. 25, 1993)

A continuance of a hearing into the validity of a mining claim will only be granted where the mining claimant presents sufficient reason to justify the grant of an additional opportunity to present his case, *i.e.*, where circumstances have placed a substantial constraint upon his ability to obtain or offer samples or other evidence of a discovery.

United States v. Mineco, United States v. Cyrus L. & Mary F. Colburn, United States v. Cache Properties, 127 IBLA 181 (Sept. 7, 1993)

ADMINISTRATIVE PROCEDURE--Continued

JUDICIAL REVIEW

When a U.S. Court of Appeals has held that a claimant is entitled to equitable adjudication of his untimely application to purchase a trade and manufacturing site and the NPS has neither submitted any evidence contradicting the facts underpinning that holding nor demonstrated that the claimant's failure to timely comply with the law indicated bad faith, BLM properly considers the purchase application on the merits under the principles of equitable adjudication.

Nat'l Park Service (Stuart G. Ramstad), 125 IBLA 335 (Mar. 29, 1993)

When a U.S. Court of Appeals held that lands selected by and approved for conveyance to the State of Alaska under the Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (July 28, 1956), were lands "selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act" and were properly withdrawn for Native village selection under 43 U.S.C. § 1610(a)(2) (1988), the doctrine of the law of the case compelled affirmation of a BLM decision on judicial remand implementing the court's decision.

Vern T. Weiss et al., 128 IBLA 119 (Dec. 22, 1993)

STANDING

A party will not be accorded standing to appeal from a BLM decision where it does not demonstrate that it has a legally cognizable interest which has been adversely affected by that decision. Where the party appeals a BLM record of decision that, by itself, has no consequences, actual or threatened, so far as the environment and any members of the public are concerned because no activity can take place until after preparation of site-specific environmental analyses; and where any adverse consequences would occur, if at all, only if BLM decides to lease particular parcels, the

ADMINISTRATIVE PROCEDURE--Continued

STANDING--Continued

party lacks standing to appeal the ROD because it has not yet been adversely affected by such decision, that is, its appeal is premature.

Colorado Environmental Coalition, 125 IBLA 287 (Feb. 26, 1993)

Even though an appellant did not actively participate in the process leading to the issuance of the BLM ADC decision, where the appellant expressly requested leave to participate in that process and where BLM led appellant to believe that it would have an opportunity to do so, appellant was a "party to the case" as described in 43 CFR 4.410(a). Further, where the appellant makes a specific, colorable allegation in its notice of appeal that its members use an area affected by BLM's ADC plan, appellant is "adversely affected" within the meaning of 43 CFR 4.410(a). As both elements of that regulation are met, appellant has standing to appeal.

Predator Project, 127 IBLA 50 (July 20, 1993)

In order to have standing to appeal to the Board of Land Appeals, the appellant must have been adversely affected by the decision being appealed. If no right to appeal exists, a party may be granted amicus curiae status.

Dvorak Expeditions et al., 127 IBLA 145 (Aug. 25, 1993)

ADMINISTRATIVE PROCEDURE--Continued

STANDING--Continued

Standing before the Board of Land Appeals is governed by 43 CFR 4.410(a), and the decisional law of the Department, and not by judicial determinations on standing.

The appeal of an administrative determination by BLM that a road is a R.S. 2477 right-of-way will be dismissed for lack of standing where the appellant makes no colorable allegation of adverse effect. That a group's organizational interest in protection of the public lands, which its members utilize, might be adversely affected by a BLM action is not subject to dispute. However, the group may not rely on that general organizational interest alone in challenging a BLM action. It must identify how the particular BLM action in question actually adversely affects its interest.

Southern Utah Wilderness Alliance, 127 IBLA 325
(Oct. 14, 1993)

A person doing business with an Indian tribe lacks standing to raise a violation of the requirements of 25 U.S.C. § 81 (1988).

The qui tam provision of 25 U.S.C. § 81 (1988), authorizes Federal courts to hear suits brought under that section by third parties in the name of the U.S. and, under appropriate circumstances, to order the recovery of money paid by or on behalf of an Indian tribe. The Board of Indian Appeals is not a Federal court, and the qui tam provision does not grant standing in an administrative proceeding before the Board.

Robert & Krista Johnson v. Acting Phoenix Area Director, Bureau of Indian Affairs, 25 IBIA 18 (Nov. 12, 1993)

ADMINISTRATIVE PROCEDURE--Continued

STAYS

The effectiveness of a BLM decision to round up and remove wild horses during the pendency of an appeal to the Board of Land Appeals is controlled by 43 CFR 4770.3(c), not by 43 CFR 4.21(a) (58 FR 4942-43 (Jan. 19, 1993)). Where BLM fails to place its roundup decision into full force and effect on a specified date, pursuant to 43 CFR 4770.3(c), and a notice of appeal of that decision is timely filed, it is error for BLM to proceed with the roundup, as the effect of BLM's decision is stayed during the appeal period and pending the Board's ruling on the appeal.

Animal Protection Institute of America, 128 IBLA 90 (Dec. 10, 1993)

ALASKA

ALASKA NATIVE CLAIMS SETTLEMENT ACT

When a U.S. Court of Appeals held that lands selected by and approved for conveyance to the State of Alaska under the Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (July 28, 1956), were lands "selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act" and were properly withdrawn for Native village selection under 43 U.S.C. § 1610(a)(2) (1988), the doctrine of the law of the case compelled affirmation of a BLM decision on judicial remand implementing the court's decision.

Vern T. Weiss et al., 128 IBLA 119 (Dec. 22, 1993)

ALASKA--Continued

INDIAN AND NATIVE AFFAIRS

When surveying the boundaries of an Indian reservation created in 1891 on an island off the coast of Alaska, it was not proper to include an island in the reservation that clearly was not included as the reservation was defined by the President in 1916.

State of Alaska, Forest Service, U.S. Dept. of Agriculture, 127 IBLA 1 (July 12, 1993)

NATIVE ALLOTMENTS

An ALJ's conclusion that a Native allotment applicant commenced qualifying use and occupancy of the claimed land prior to the effective date of a withdrawal of the land will be upheld on appeal where the conclusion is based upon a review of all the evidence presented at a hearing and the Judge's resolution of disputed facts is necessarily influenced by his consideration of the credibility of the witnesses testifying at the hearing.

A Government contest of a Native allotment application based on a charge of failure to use and occupy the land to the potential exclusion of others is properly dismissed where the Native shows by a preponderance of the evidence, presented through his testimony and that of numerous witnesses, that his use and occupancy of various improvements on the site for fall hunting purposes were, in fact, at least potentially exclusive of others.

United States v. Edward N. O'Leary, 125 IBLA 235 (Feb. 11, 1993)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

A Native allotment was not subject to an amended right-of-way grant for a Federal-Aid Highway because the amendment was subject to valid existing rights and was made after initiation of the Native claim.

State of Alaska Dept. of Transportation & Public Facilities, 125 IBLA 291 (Mar. 9, 1993)

Under sec. 905(a)(5)(C) of ANILCA, 43 U.S.C. § 1634(a)(5)(C) (1988), any individual objecting to the approval of a Native allotment application must file a protest within the period established by ANILCA and must allege that the land described in the application is the situs of improvements claimed by the person filing the protest. Where an individual files a protest after the statutory deadline, the protest is properly dismissed.

Marshall McManus, 126 IBLA 168 (May 11, 1993)

The timely filing of a valid protest against a Native allotment under 43 U.S.C. § 1634(a)(5)(B) (1988), is sufficient to prevent legislative approval, even where that protest is subsequently withdrawn. A BLM decision denying the State's protest on the ground that no trail exists that conflicts with the Native allotment will not be affirmed where the record reveals that an easement has been granted for a trail and that the easement probably crosses the allotment.

Where a Native allotment applicant never objected during her life to BLM's placement of her allotment parcel on the ground, and where her heirs have not subsequently objected, BLM's placement of the parcel will be affirmed on appeal in the absence of irrefragable showing beyond question that the parcel that BLM

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

approved is not the land the applicant intended to claim.

State of Alaska, Heirs of Lucy Charlie, 126 IBLA 204
(May 20, 1993)

A BLM decision finding a right-of-way for an electric distribution line null and void to the extent it conflicts with a Native allotment application is reversed and remanded to permit issuance of the Native allotment subject to the right-of-way where the record shows occupancy of the land by the power line was approved, and it was constructed and operated for 4 years before the Native allotment applicant began use and occupancy of his allotment.

Naknek Electric Ass'n, Inc., 126 IBLA 256 (June 2, 1993)

To the extent that pending Native allotment applications describe lands previously conveyed out of Federal ownership, these applications were not subject to legislative approval by sec. 905 of ANILCA, 43 U.S.C. § 1634 (1988).

An interim conveyance is similar to a patent in that it conveys legal title to the land described. In the absence of legal title, DOI lacks jurisdiction to adjudicate entitlement of an applicant for a tract of land. Where the applicant is a Native American, the fiduciary duty of DOI may justify a review of the application to determine whether to seek reconveyance of the land.

With respect to lands which have been conveyed out of Federal ownership, a decision accepting a Native allotment application as amended is not an adversarial adjudication of entitlement of the applicant to an allotment which is dispositive of the rights of the applicant or adverse parties since DOI lacks jurisdiction to make such a ruling in the absence of legal

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

title. In this context, an appeal by an adverse party is properly dismissed as premature. If the land is reconveyed, any decision adjudicating the amended location will be subject to appeal.

Bay View, Inc., 126 IBLA 281 (June 7, 1993)

In approving a Native allotment application, BLM properly reserved a 100-foot-wide easement across the allotment for an existing public road constructed along the route of a relinquished railroad right-of-way where the land had, prior to the Native's use and occupancy, been established by the Secretary of the Interior as part of a 100-foot-wide public highway pursuant to the Act of June 30, 1932, ch. 320, 47 Stat. 446, and then been quitclaimed to the State of Alaska. Reservation of an easement conforming to the width of the relinquished right-of-way was not required because that right-of-way ceased to exist when the relinquishment was accepted.

State of Alaska, Dept. of Transportation & Public Facilities, 127 IBLA 137 (Aug. 25, 1993)

When a Native allotment applicant amends the land description of her allotment application to move the location of the land sought, she has the burden of establishing that the amended description correctly describes the land that she originally intended to claim. BLM may not approve such an amendment without giving notice of the amendment to parties. BLM also may not approve such an amendment without requiring the applicant to demonstrate that the land in the amended description was the land she originally claimed based upon her use and occupancy of it that was potentially exclusive of others.

Alyeska Pipeline Service Co., State of Alaska, 127 IBLA 156 (Aug. 26, 1993)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

Sec. 905(b) of ANILCA authorizes the Secretary of the Interior to adjust land descriptions to eliminate conflicts between two Native allotment applications by altering the allotment boundaries to achieve an adjustment that is consistent with prior use of the allotted land. Although the statute encourages Departmental implementation of adjustments proposed by the parties concerned, where they have attempted but failed to resolve their conflicting claims, a hearing will be ordered to resolve the dispute.

Anna S. Moxie, 127 IBLA 175 (Sept. 2, 1993)

In a Government contest of an Alaska Native allotment application, the contestant bears the burden of presenting sufficient evidence to establish a prima facie case of ineligibility and the Native applicant bears the burden of proof by a preponderance of the evidence should a prima facie case be established. While a limited field examination presenting no significant evidence will not support a prima facie case, the applicant's statements, which if unrebutted would contradict the applicant's use of the allotment lands, may constitute a prima facie case.

The ultimate burden of proof in an Alaska Native allotment application is on the applicant to establish compliance with the use and occupancy requirements of the Native Allotment Act. Where the evidence has been reviewed and the allotment approved, an appellant before the Board is to show by a preponderance of the evidence that the challenged decision is in error. Thus, the parties in an appeal from a decision approving a Native allotment application must seek to establish their respective positions at some point by a preponderance of the evidence, which means that there must be a showing that something is more likely than not.

Under the authority of sec. 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), the description in a Native allotment application may be amended where it designates

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

land other than that which the applicant intended to claim at the time of the application.

Use of the land which does not leave physical evidence of use may be sufficient to establish entitlement to an Alaska Native allotment provided the applicant demonstrates by a preponderance of the evidence substantiality and exclusivity. Where witnesses for the applicant testify to his regular use of the land in question for subsistence hunting and other activities which do not always alter the appearance of the land, the requirement of substantial use is satisfied. The existence of other indicia of hunting attributed to the applicant, such as a campsite or trap sites, corroborates use of the land. In considering whether the use was exclusive of others, the Native customs and mode of living may be taken into consideration. The posting of the land and the testimony of witnesses that the applicant had affirmatively declared the area as his allotment are sufficient in the absence of contrary evidence to preponderate on the issue of exclusivity. A challenge to use of the subject land as intermittent or discontinued based on statements of the applicant that he had been to the subject lands only a few times over several years is adequately rebutted by testimony explaining the statements and verifying regular use of the land.

United States v. The Heirs of David F. Berry, 127 IBLA 196 (Sept. 14, 1993)

A Native allotment application was pending before the DOI on Dec. 18, 1971, if it was filed in any bureau, division, or agency of the Department on or before that date. Where evidence shows that an application was delivered to the BIA before that date, the application was timely.

An Alaskan Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of the land for a minimum period of 5 years. Such use and occupancy contemplates substantial

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

actual possession or use of the land, at least potentially exclusive of others, and not merely intermittent use.

The right to a Native allotment vests only upon the completion of 5 years' use or occupancy of land and the filing of an application therefor. Absent the timely filing of an allotment application, where a Native, who has completed the requisite 5 years' use, ceases to use or occupy the land and permits the land to return to an unoccupied state, the right to an allotment of that land also terminates, regardless of the subjective intent of the Native.

United States v. Palakia Melgenak, 127 IBLA 224 (Sept. 24, 1993)

A BLM decision to accept a revised Native allotment application covering lands previously conveyed out of Federal ownership lacked finality and consequently was not an appealable action.

State of Alaska, 127 IBLA 276 (Oct. 4, 1993)

In cases where the amount of land originally applied for in a Native allotment application is at issue, the proper standard of proof to be applied is the preponderance of the evidence.

Under sec. 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), a Native allotment application may not be amended to describe land in addition to that described in the original application.

United States v. Heirs of Ambrose Kozevnikoff, 128 IBLA 130 (Dec. 30, 1993)

ALASKA--Continued

NAVIGABLE WATERS

Generally

The reservation of the power of exclusive legislation in sec. 11(b) of the Alaska Statehood Act is expressly predicated on the fact of continued Federal ownership of parcels held for Coast Guard purposes, and Congress intended to retain ownership over tidelands reserved for lighthouse purposes by defeating the State's equal footing entitlement.

State of Alaska, 127 IBLA 317 (Oct. 13, 1993)

STATEHOOD ACT

The reservation of the power of exclusive legislation in sec. 11(b) of the Alaska Statehood Act is expressly predicated on the fact of continued Federal ownership of parcels held for Coast Guard purposes, and Congress intended to retain ownership over tidelands reserved for lighthouse purposes by defeating the State's equal footing entitlement.

State of Alaska, 127 IBLA 317 (Oct. 13, 1993)

When a U.S. Court of Appeals held that lands selected by and approved for conveyance to the State of Alaska under the Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (July 28, 1956), were lands "selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act" and were properly withdrawn for Native village selection under 43 U.S.C. § 1610(a)(2) (1988), the doctrine of the law of the case compelled affirmation of a BLM decision on judicial remand implementing the court's decision.

Vern T. Weiss et al., 128 IBLA 119 (Dec. 22, 1993)

ALASKA--Continued

TOWNSITES

Where a decision of the Alaska Townsite Trustee, approving one of two conflicting applications for the same townsite lot, is based on a state divorce decree, rather than on the statutes and regulations governing townsites in Alaska, that decision will be vacated and remanded for a determination of who occupied the lot or was entitled to occupancy thereof on the date of approval of the final subdivisional survey.

Joe L. Herbert, 128 IBLA 13 (Nov. 3, 1993)

TRADE AND MANUFACTURING SITES

When a U.S. Court of Appeals has held that a claimant is entitled to equitable adjudication of his untimely application to purchase a trade and manufacturing site and the NPS has neither submitted any evidence contradicting the facts underpinning that holding nor demonstrated that the claimant's failure to timely comply with the law indicated bad faith, BLM properly considers the purchase application on the merits under the principles of equitable adjudication.

Although sec. 1870.33B of the BLM Manual requires BLM to contact the agency that has jurisdiction over the claimed land and request its concurrence in the allowance of an application, the refusal of the holding agency to concur in the allowance of the application does not preclude BLM from approving the application under its equitable adjudication authority.

A party appealing from a BLM decision has the burden of establishing error in the decision under appeal, and conclusory allegations of error, standing alone, do not discharge this burden.

Nat'l Park Service (Stuart G. Ramstad), 125 IBLA 335 (Mar. 29, 1993)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

GENERALLY

Sec. 1410 of ANILCA authorizes the Secretary to withdraw lands within units of national parks and wildlife refuges to satisfy village corporation ANCSA entitlements if the land had been withdrawn during the original ANCSA selection period for selection by specific village corporation. Because lands within national parks in existence on Dec. 18, 1971 (the date of ANCSA's enactment) were excluded from the original withdrawals, such park lands may not be withdrawn now. The Secretary may withdraw park lands added to the National Park system after ANCSA's enactment.

The Secretary may withdraw wildlife refuge lands regardless of the date on which the lands were placed in the National Wildlife Refuge. However, sec. 1410 does not authorize the Secretary to withdraw park or refuge lands located outside the boundaries of the original ANCSA withdrawals.

Authority of the Secretary to Withdraw Land Within National Parks & Wildlife Refuges for Selection by Underselected Alaska Native Village Corporations, M-36972 (Oct. 16, 1991) 100 I.D. 163

The provisions of sec. 1323(b) of ANILCA, 16 U.S.C. § 3210(b) (1988), do not apply with respect to access to a Federal oil and gas lease since the leasehold estate does not constitute "nonfederally owned land" within the meaning of the statute.

Southern Utah Wilderness Alliance et al., 127 IBLA 331 (Oct. 19, 1993) 100 I.D. 370

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

DUTY OF DEPARTMENT OF THE INTERIOR TO
NATIVE ALLOTMENT APPLICANTS

An interim conveyance is similar to a patent in that it conveys legal title to the land described. In the absence of legal title, DOI lacks jurisdiction to adjudicate entitlement of an applicant for a tract of land. Where the applicant is a Native American, the fiduciary duty of DOI may justify a review of the application to determine whether to seek reconveyance of the land.

Bay View, Inc., 126 IBLA 281 (June 7, 1993)

NATIVE ALLOTMENTS

An ALJ's conclusion that a Native allotment applicant commenced qualifying use and occupancy of the claimed land prior to the effective date of a withdrawal of the land will be upheld on appeal where the conclusion is based upon a review of all the evidence presented at a hearing and the Judge's resolution of disputed facts is necessarily influenced by his consideration of the credibility of the witnesses testifying at the hearing.

A Government contest of a Native allotment application based on a charge of failure to use and occupy the land to the potential exclusion of others is properly dismissed where the Native shows by a preponderance of the evidence, presented through his testimony and that of numerous witnesses, that his use and occupancy of various improvements on the site for fall hunting purposes were, in fact, at least potentially exclusive of others.

United States v. Edward N. O'Leary, 125 IBLA 235
(Feb. 11, 1993)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

NATIVE ALLOTMENTS--Continued

Under sec. 905(a)(5)(C) of ANILCA, 43 U.S.C. § 1634(a)(5)(C) (1988), any individual objecting to the approval of a Native allotment application must file a protest within the period established by ANILCA and must allege that the land described in the application is the situs of improvements claimed by the person filing the protest. Where an individual files a protest after the statutory deadline, the protest is properly dismissed.

Marshall McManus, 126 IBLA 168 (May 11, 1993)

The timely filing of a valid protest against a Native allotment under 43 U.S.C. § 1634(a)(5)(B) (1988), is sufficient to prevent legislative approval, even where that protest is subsequently withdrawn. A BLM decision denying the State's protest on the ground that no trail exists that conflicts with the Native allotment will not be affirmed where the record reveals that an easement has been granted for a trail and that the easement probably crosses the allotment.

Where a Native allotment applicant never objected during her life to BLM's placement of her allotment parcel on the ground, and where her heirs have not subsequently objected, BLM's placement of the parcel will be affirmed on appeal in the absence of irrefragable showing beyond question that the parcel that BLM approved is not the land the applicant intended to claim.

State of Alaska, Heirs of Lucy Charlie, 126 IBLA 204 (May 20, 1993)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

NATIVE ALLOTMENTS--Continued

To the extent that pending Native allotment applications describe lands previously conveyed out of Federal ownership, these applications were not subject to legislative approval by sec. 905 of ANILCA, 43 U.S.C. § 1634 (1988).

With respect to lands which have been conveyed out of Federal ownership, a decision accepting a Native allotment application as amended is not an adversarial adjudication of entitlement of the applicant to an allotment which is dispositive of the rights of the applicant or adverse parties since DOI lacks jurisdiction to make such a ruling in the absence of legal title. In this context, an appeal by an adverse party is properly dismissed as premature. If the land is reconveyed, any decision adjudicating the amended location will be subject to appeal.

Bay View, Inc., 126 IBLA 281 (June 7, 1993)

When a Native allotment applicant amends the land description of her allotment application to move the location of the land sought, she has the burden of establishing that the amended description correctly describes the land that she originally intended to claim. BLM may not approve such an amendment without giving notice of the amendment to parties. BLM also may not approve such an amendment without requiring the applicant to demonstrate that the land in the amended description was the land she originally claimed based upon her use and occupancy of it that was potentially exclusive of others.

Alyeska Pipeline Service Co., State of Alaska, 127 IBLA 156 (Aug. 26, 1993)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

NATIVE ALLOTMENTS--Continued

Sec. 905(b) of ANILCA authorizes the Secretary of the Interior to adjust land descriptions to eliminate conflicts between two Native allotment applications by altering the allotment boundaries to achieve an adjustment that is consistent with prior use of the allotted land. Although the statute encourages Departmental implementation of adjustments proposed by the parties concerned, where they have attempted but failed to resolve their conflicting claims, a hearing will be ordered to resolve the dispute.

Anna S. Moxie, 127 IBLA 175 (Sept. 2, 1993)

Under the authority of sec. 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), the description in a Native allotment application may be amended where it designates land other than that which the applicant intended to claim at the time of the application.

United States v. The Heirs of David F. Berry, 127 IBLA 196 (Sept. 14, 1993)

A BLM decision to accept a revised Native allotment application covering lands previously conveyed out of Federal ownership lacked finality and consequently was not an appealable action.

State of Alaska, 127 IBLA 276 (Oct. 4, 1993)

In cases where the amount of land originally applied for in a Native allotment application is at issue, the proper standard of proof to be applied is the preponderance of the evidence.

Under sec. 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), a Native allotment application may not be

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

NATIVE ALLOTMENTS--Continued

amended to describe land in addition to that described in the original application.

United States v. Heirs of Ambrose Kozevnikoff, 128 IBLA 130 (Dec. 30, 1993)

ALASKA NATIVE CLAIMS SETTLEMENT ACT

GENERALLY

Sec. 1410 of ANILCA authorizes the Secretary to withdraw lands within units of national parks and wildlife refuges to satisfy village corporation ANCSA entitlements if the land had been withdrawn during the original ANCSA selection period for selection by specific village corporation. Because lands within national parks in existence on Dec. 18, 1971 (the date of ANCSA's enactment) were excluded from the original withdrawals, such park lands may not be withdrawn now. The Secretary may withdraw park lands added to the National Park system after ANCSA's enactment.

Authority of the Secretary to Withdraw Land Within National Parks & Wildlife Refuges for Selection by Underselected Alaska Native Village Corporations, M-36972 (Oct. 16, 1991) 100 I.D. 163

CONVEYANCES

Cemetery Sites and Historical Places

Sec. 14(h)(1) of ANCSA, 43 U.S.C. § 1613(h)(1) (1988), provides the Secretary may withdraw and convey

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Cemetery Sites and Historical Places--Continued

fee title to existing cemetery sites and historical places to the appropriate regional corporation. If a regional corporation files an application under sec. 14(h)(1), the Secretary may give favorable consideration to the application provided that the Secretary determines that the criteria in the regulations are met. 43 CFR 2653.5(a). For a historical place, this means that it must be a distinguishable tract of land or area where a significant Native historical event occurred or which was subject to sustained Native historical activity.

When the evidence of record about a potential historical place is inconclusive, but the evidence offers sufficient indications of possible sustained Native historical activity, the rejection of an application for a historical place may be set aside and the case remanded for further investigation.

Sealaska Corp., 126 IBLA 383 (July 6, 1993)

Sec. 14(h)(1) of ANSCA, 43 U.S.C. § 1613(h)(1) (1988), provides the Secretary may withdraw and convey fee title to existing cemetery sites and historical places to the appropriate regional corporation. If a regional corporation files an application under sec. 14(h)(1), the Secretary may give favorable consideration to the application provided that the Secretary determines that the criteria in the regulations are met. 43 CFR 2653.5(a). For a historical place, this means that it must be a distinguishable tract of land or area where a significant Native historical event occurred or which was subject to sustained Native historical activity.

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Cemetery Sites and Historical Places--Continued

BLM properly rejects a selection application for a historical place under sec. 14(h)(1) of ANCSA when the record fails to establish that the site has historic significance for Native history or culture and the site does not meet the criteria set forth at 43 CFR 2653.5.

A party challenging BLM's rejection of its historical place selection application under sec. 14(h)(1) of ANCSA bears the burden of establishing by a preponderance of the evidence that such rejection is in error.

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and BLM properly reviewed the same information submitted to this Board.

Sealaska Corp., 127 IBLA 22 (July 15, 1993)

Sec. 14(h)(1) of ANSCA, 43 U.S.C. § 1613(h)(1) (1988), authorizes the Secretary of the Interior to withdraw and convey existing historical places and cemetery sites to the appropriate regional corporation. BLM properly grants an application for a historical place when the record establishes that the site is a distinguishable tract of land or area upon which occurred a significant Native historical event, which is importantly associated with Native historical cultural events or persons, and meets the criteria set forth at 43 CFR 2653.5.

Sealaska Corp., 127 IBLA 40 (July 15, 1993)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Cemetery_Sites_and_Historical_Places--Continued

Sec. 14(h)(1) of ANSCA, 43 U.S.C. § 1613(h)(1) (1988), authorizes the Secretary of the Interior to withdraw and convey existing historical places and cemetery sites to the appropriate regional corporation. BLM properly rejects a selection application for a historical place when the site does not meet the criteria set forth at 43 CFR 2653.5.

A party challenging BLM's rejection of its historical place selection application under sec. 14(h)(1) of ANSCA, 43 U.S.C. § 1613(h)(1) (1988), bears the burden of establishing by a preponderance of the evidence that such rejection is in error.

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and BLM properly reviewed the same information submitted to this Board.

Sealaska Corp., 127 IBLA 59 (July 20, 1993)

NATIVE LAND SELECTIONS

State-Selected_Lands

When a U.S. Court of Appeals held that lands selected by and approved for conveyance to the State of Alaska under the Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (July 28, 1956), were lands "selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act" and were properly withdrawn for Native village selection under 43 U.S.C. § 1610(a)(2) (1988), the doctrine of the

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

NATIVE LAND SELECTIONS--Continued

State-Selected_Lands--Continued

law of the case compelled affirmation of a BLM decision on judicial remand implementing the court's decision.

Vern T. Weiss et al., 128 IBLA 119 (Dec. 22, 1993)

Village Selections

When a U.S. Court of Appeals held that lands selected by and approved for conveyance to the State of Alaska under the Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (July 28, 1956), were lands "selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act" and were properly withdrawn for Native village selection under 43 U.S.C. § 1610(a)(2) (1988), the doctrine of the law of the case compelled affirmation of a BLM decision on judicial remand implementing the court's decision.

Vern T. Weiss et al., 128 IBLA 119 (Dec. 22, 1993)

WITHDRAWALS AND RESERVATIONS

Withdrawals for Native Selection

State-Selected Lands

When a U.S. Court of Appeals held that lands selected by and approved for conveyance to the State of Alaska under the Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (July 28, 1956), were lands "selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act" and were properly withdrawn for Native village selection under 43 U.S.C. § 1610(a)(2) (1988), the doctrine of the

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

WITHDRAWALS AND RESERVATIONS--Continued

Withdrawals for Native Selection--Continued

State-Selected Lands--Continued

law of the case compelled affirmation of a BLM decision on judicial remand implementing the court's decision.

Vern T. Weiss et al., 128 IBLA 119 (Dec. 22, 1993)

ANIMAL DAMAGE CONTROL

Even though an appellant did not actively participate in the process leading to the issuance of the BLM ADC decision, where the appellant expressly requested leave to participate in that process and where BLM led appellant to believe that it would have an opportunity to do so, appellant was a "party to the case" as described in 43 CFR 4.410(a). Further, where the appellant makes a specific, colorable allegation in its notice of appeal that its members use an area affected by BLM's ADC plan, appellant is "adversely affected" within the meaning of 43 CFR 4.410(a). As both elements of that regulation are met, appellant has standing to appeal.

Where BLM fails to submit an adequate case record in support of its record of decision authorizing ADC action, its decision is properly set aside and remanded.

Where BLM fails to establish the need for an ADC program and where the record demonstrates only an extremely low level of reported (although not confirmed) losses (four sheep lost to coyotes) from BLM lands, BLM's decision is properly set aside and remanded.

Where BLM fails to accommodate a third party's desire to participate in its decisionmaking process concerning ADC, and where BLM issues on Feb. 25, 1993, a decision authorizing ADC commencing on Oct. 1, 1992, BLM's decision may be properly set aside and remanded to

ANIMAL DAMAGE CONTROL--Continued

allow third parties to participate to ensure that BLM's ADC decisions predate the authorized ADC activity.

Predator Project, 127 IBLA 50 (July 20, 1993)

APPEALS

(See also Administrative Procedure, Contracts, Grazing Permits & Licenses, Indian Probate, Indians, Rules of Practice, Torts, Uniform Relocation Assistance & Real Property Acquisition Policies Act of 1970)

GENERALLY

The time limits for protesting a proposed decision under 43 CFR 4160.2 and for filing an appeal of a final decision under 43 CFR 4160.3 and 4160.4 are mandatory. If a proposed decision is not protested within 15 days after it is received, it becomes a final decision without further notice and is then subject to appeal for 30 days.

William J. Thoman v. Bureau of Land Management, 125 IBLA 100 (Jan. 8, 1993)

A party will not be accorded standing to appeal from a BLM decision where it does not demonstrate that it has a legally cognizable interest which has been adversely affected by that decision. Where the party appeals a BLM record of decision that, by itself, has no consequences, actual or threatened, so far as the environment and any members of the public are concerned because no activity can take place until after preparation of site-specific environmental analyses; and where any adverse consequences would occur, if at all, only if BLM decides to lease particular parcels, the party lacks standing to appeal the ROD because it has

APPEALS--Continued

GENERALLY--Continued

not yet been adversely affected by such decision, that is, its appeal is premature.

Colorado Environmental Coalition, 125 IBLA 287 (Feb. 26, 1993)

Even though an appellant did not actively participate in the process leading to the issuance of the BLM ADC decision, where the appellant expressly requested leave to participate in that process and where BLM led appellant to believe that it would have an opportunity to do so, appellant was a "party to the case" as described in 43 CFR 4.410(a). Further, where the appellant makes a specific, colorable allegation in its notice of appeal that its members use an area affected by BLM's ADC plan, appellant is "adversely affected" within the meaning of 43 CFR 4.410(a). As both elements of that regulation are met, appellant has standing to appeal.

Predator Project, 127 IBLA 50 (July 20, 1993)

Failure of the operator to appeal assessment decisions for incidents of noncompliance issued for violations of the oil and gas operations regulations renders those decisions and the findings contained therein final for the Department and precludes the operator from challenging the merits of the violations or the amounts assessed in a subsequent appeal of a decision demanding payment.

CCCo., 127 IBLA 291 (Oct. 7, 1993)

APPEALS--Continued

GENERALLY--Continued

When, on appeal from a decision on State Director review affirming a Decision Record and FONSI approving an APD to drill a natural gas well, the appellant seeks to raise additional issues which it did not present for State Director review and which were not addressed in the decision, the Board need not adjudicate such issues, but may confine its review to matters addressed in that decision.

Southern Utah Wilderness Alliance et al., 128 IBLA 52
(Dec. 2, 1993)

An individual's request "to add her name" to a timely filed appeal by an organization is properly denied if not filed within the 30-day timeframe established by regulation. Where the individual indicates that she has been an interested party to Wyoming's management of wild horses for several years, she may either provide input to the organization so that it may incorporate her views or may request permission to appeal as amicus curiae.

Animal Protection Institute of America, 128 IBLA 90
(Dec. 10, 1993)

JURISDICTION

A statute establishing time limitations for the commencement of judicial actions for damages on behalf of the U.S. does not limit administrative proceedings within the DOI.

Bolling Construction Co. & Bob Bolling, 125 IBLA 303
(Mar. 16, 1993)

APPEALS--Continued

JURISDICTION--Continued

Although OHA does not have authority to review the merits of biological opinions issued by the U.S. Fish & Wildlife Service under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), it has jurisdiction over an appeal from the rejection by BLM of an application for a right-of-way on the grounds that the right-of-way would destroy a Category 1 candidate species of plant and its habitat.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

Respect for tribal self-government requires that tribal remedies be exhausted before a Federal forum may entertain a challenge to tribal actions or authority. This is particularly true where the matter at issue involves tribal membership.

Janie Jovita Flores et al. v. Acting Anadarko Area Director, Bureau of Indian Affairs, 25 IBIA 6 (Nov. 12, 1993)

When, on appeal from a decision on State Director review affirming a Decision Record and FONSI approving an APD to drill a natural gas well, the appellant seeks to raise additional issues which it did not present for State Director review and which were not addressed in the decision, the Board need not adjudicate such issues, but may confine its review to matters addressed in that decision.

OHA does not have authority to review the merits of biological opinions issued by the U.S. FWS under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988); however, an appellant's arguments concerning consistency with a biological opinion would normally be subject to review.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

APPLICATION FOR PERMIT TO DRILL

When, on appeal from a decision on State Director review affirming a Decision Record and FONSI approving an APD to drill a natural gas well, the appellant seeks to raise additional issues which it did not present for State Director review and which were not addressed in the decision, the Board need not adjudicate such issues, but may confine its review to matters addressed in that decision.

Although an appellant bears the burden of demonstrating error where BLM has determined that a proposed action is not likely to affect a threatened or endangered species, the record on appeal must support BLM's action, and where BLM concludes that the drilling of a natural gas well will not affect the bald eagle because no active eyries or nests were located during the survey of the area, but the record fails to show that searches for bald eagles were conducted in the winter and early spring when bald eagles are known to inhabit the area, BLM's determination will be set aside and the case remanded.

Where, in response to a challenge to approval of an APD to drill a natural gas well, BLM states that no special status plant species, including threatened and endangered plants, were found during a survey of the proposed project area, such a determination must be supported by the record. When the record on appeal contains no evidence of who conducted the survey, any field report, or any description of the methodology employed in making the determination, that determination will be set aside and the case remanded.

A determination by BLM that approval of an APD to drill a natural gas well will not eliminate a river from eligibility for potential inclusion within the National Wild and Scenic River System, pursuant to sec. 5(d) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1276(d) (1988), is supported by the record where there is no evidence in the record that drilling the well in

APPLICATION FOR PERMIT TO DRILL--Continued

question would adversely affect all the river's outstandingly remarkable values so as to render it ineligible for consideration.

A determination that approval of an APD to drill a natural gas well will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

APPRAISALS

When the right-of-way grant specifically provided for periodic rental adjustments to bring the right-of-way rental in line with fair market rental values it is proper for BLM to increase the annual rental to conform the rental amount to the current fair market rental value of the right-of-way.

Valley Pioneers Water Co., Inc., 125 IBLA 326 (Mar. 25, 1993)

APPRAISALS--Continued

An appraisal will not be set aside unless an appellant shows error in the method of appraisal or shows by convincing evidence that the charges are excessive. When the decision of an ALJ does not clearly apply to this standard, the Board will review the evidence and the arguments of the parties to determine whether the result reached should be considered erroneous.

An appraiser's training and experience are properly considered in determining the weight to be given testimony. When an appraisal lacks an analysis showing why a specific value was selected from a range of values, the ALJ who presides at a hearing is in the best position to decide the weight to be accorded the appraiser's testimony.

Richard Connie Nielson v. The Bureau of Land Management,
125 IBLA 353 (Mar. 30, 1993)

A BLM increase in the rental charge for a communication site right-of-way is properly affirmed where the holder of the right-of-way fails to establish that the appraisal upon which the increase is based incorrectly determined the fair market rental value of the right-of-way. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of the right-of-way rental or the appellant demonstrates that the resulting charges are excessive. Absent a showing of error in the appraisal methods, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Quality Broadcasting Corp., Unicom Broadcasting, Inc.,
126 IBLA 174 (May 11, 1993)

APPRAISALS--Continued

A BLM increase in the annual rental charge for a communications site right-of-way will be vacated where the record fails to demonstrate any relationship between the right-of-way subject to appraisal and a BLM master appraisal determining the market value of a "typical" BLM right-of-way, and where there is no indication that the communications site at issue matched the comparable factors in BLM's appraisal for a "typical" right-of-way.

Confidential Communications Co., 126 IBLA 349 (June 25, 1993)

An increase in the annual rental charge for a communications site right-of-way will be set aside if the record fails to demonstrate any relationship between the right-of-way subject to appraisal and a BLM master appraisal determining the market value of a "typical" BLM right-of-way, and there is no indication that the comparable factors at the communications site at issue matched the comparable factors considered in BLM's appraisal of a "typical" right-of-way.

Western Tele-Communications, Inc., 127 IBLA 313 (Oct. 12, 1993)

A protest against an exchange of public and private land was properly denied when it was not shown that the proposal was contrary to valuation requirements imposed by FLPMA sec. 206 and applicable regulations, or that it violated operative land-use plans, or that the exchange was contrary to the public interest. The fact that the exchange resolved a trespass did not establish that it was contrary to public policy.

Brent Hansen et al., 128 IBLA 17 (Nov. 4, 1993)

ATTORNEY FEES

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

In order for one who participates in an administrative proceeding reviewing an enforcement action to receive an award of costs and expenses under 43 CFR 4.1294(a)(1), there must be a determination that (1) a violation of the Act, regulations, or permit has occurred, or that an imminent hazard existed; (2) the participant made a substantial contribution to the full and fair determination of the issues; and (3) the contribution was separate and distinct from the contribution made by the person initiating the proceeding.

Where a participating party seeking an award of costs and expenses, including attorneys' fees, under 43 CFR 4.1294(a)(1), alleges that it made a separate and distinct contribution but fails to describe with specificity what that separate and distinct contribution was and the case record does not demonstrate such a contribution, the request for an award will be denied.

Where the contribution of an intervenor is different than that of OSM, it still may not be considered "separate and distinct" under 43 CFR 4.1294(a)(1), when that contribution relates to a subsidiary issue that is decided favorably to the permittee, and the intervenor's contribution to the ultimate issue for resolution is minimal or merely cumulative to that of OSM.

Where a person intervenes in support of OSM in an administrative proceeding reviewing an enforcement action, and, thereafter, takes a position opposed to OSM, that person must be a prevailing party on that issue in order to be eligible for an award of costs and expenses, including attorneys' fees, for that issue from the permittee under 43 CFR 4.1294(a)(1).

Save Our Cumberland Mountains, Bledsoe County Chapter,
127 IBLA 245 (Sept. 28, 1993)

BANKRUPTCY CODE

GENERALLY

An appellant's claim that its debt to BLM for rental for a communication site right-of-way was discharged by the confirmation of its reorganization plan in its Chapter 11 bankruptcy proceeding will be rejected where the rental debt to BLM was neither listed nor scheduled as required by the Bankruptcy Code, and, although BLM apparently had actual notice of the bankruptcy proceeding, the appellant fails to demonstrate that the U.S. Attorney also received the notice mandated by Bankruptcy Rule 2002(j)(4).

Quality Broadcasting Corp., Unicom Broadcasting, Inc.,
126 IBLA 174 (May 11, 1993)

BOARD OF INDIAN APPEALS

JURISDICTION

Decisions to approve or disapprove conveyances of Indian trust or restricted land are committed to the discretion of BIA. In reviewing such decisions, the Board does not substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to determine the validity of title to Indian land.

Severo Leon et al. v. Albuquerque Area Director, Bureau of Indian Affairs, 23 IBIA 248 (Mar. 23, 1993)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

Decisions concerning whether or not to grant a lease of trust or restricted land are committed to the discretion of the BIA. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Theresa Jerry Moses et al. v. Acting Portland Area Director, Bureau of Indian Affairs, 24 IBIA 233 (Sept. 29, 1993)

When a claim for "finder's fees" arises within the context of a probate proceeding, seeks recovery from the IIM account of an heir or devisee, and is based on a contract that requires Departmental approval but has not been approved, the ALJ is an "authorized representative" of the Secretary of the Interior within the meaning of 25 CFR 115.9 for the purpose of considering whether the contract should be approved.

Estate of John Charlie, 24 IBIA 253 (Oct. 20, 1993)

The Board of Indian Appeals has jurisdiction over decisions issued by BIA officials under 25 CFR Chapter I. It does not have jurisdiction over decisions made by duly constituted tribal officials or governing bodies.

Arthur J. Welmas & Linda Streeter Dukic, Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 264 (Oct. 20, 1993)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

Decisions concerning whether or not to grant a lease of trust or restricted land are committed to the discretion of BIA. It is not the Board's function, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Vincent Blackhawk v. Billings Area Director, Bureau of Indian Affairs, 24 IBIA 275 (Oct. 21, 1993)

BOARD OF LAND APPEALS

Under the provisions of 43 CFR 3101.7-3, a third-party objecting to issuance of an oil and gas lease on land within the National Forest System, pursuant to the consent of the FS, has standing to appeal to the Interior Board of Land Appeals. However, to the extent that the third-party raises objections to the conformity of actions undertaken by the FS with respect to its own internal operating procedures or with laws solely applicable to the FS, the Board will not review such contentions where the FS has provided its own appeal system for the resolution of such issues.

Colorado Environmental Coalition, 125 IBLA 210 (Feb. 5, 1993)

A statute establishing time limitations for the commencement of judicial actions for damages on behalf of the U.S. does not limit administrative proceedings within the DOI.

Bolling Construction Co. & Bob Bolling, 125 IBLA 303 (Mar. 16, 1993)

BOARD OF LAND APPEALS--Continued

Although OHA does not have authority to review the merits of biological opinions issued by the U.S. Fish & Wildlife Service under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), it has jurisdiction over an appeal from the rejection by BLM of an application for a right-of-way on the grounds that the right-of-way would destroy a Category 1 candidate species of plant and its habitat.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

The failure to file a SOR subjects an appeal to summary dismissal. 43 CFR 4.402(a). If no SOR or reason for the failure to file a SOR is filed, the appeal is properly dismissed.

Dvorak Expeditions et al., 127 IBLA 145 (Aug. 25, 1993)

When, on appeal from a decision on State Director review affirming a Decision Record and FONSI approving an APD to drill a natural gas well, the appellant seeks to raise additional issues which it did not present for State Director review and which were not addressed in the decision, the Board need not adjudicate such issues, but may confine its review to matters addressed in that decision.

OHA does not have authority to review the merits of biological opinions issued by the U.S. FWS under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988); however, an appellant's arguments concerning consistency with a biological opinion would normally be subject to review.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

BOARD OF LAND APPEALS--Continued

Under 43 CFR 4.21(a)(2), 58 FR 4942-43 (Jan. 19, 1993), a decision will be effective on the day after the expiration of the time during which a person adversely affected may file a notice of appeal unless a petition for stay pending appeal is filed together with a timely notice of appeal. Where a notice of appeal is timely filed, but the petition for stay is filed after the expiration of the time period for filing an appeal, the petition is untimely and the decision becomes effective on the day after the expiration of the appeal period. However, nothing in the regulations precludes the filing of a subsequent petition for stay, and the Board of Land Appeals, in its discretion, may entertain such a petition.

Robert E. Oriskovich, 128 IBLA 69 (Dec. 6, 1993)

BOUNDARIES

(See also Accretion, Avulsion, Public Lands, Reliction, Surveys of Public Lands)

When surveying the boundaries of an Indian reservation created in 1891 on an island off the coast of Alaska, it was not proper to include an island in the reservation that clearly was not included as the reservation was defined by the President in 1916.

State of Alaska, Forest Service, U.S. Dept. of Agriculture, 127 IBLA 1 (July 12, 1993)

BUREAU OF INDIAN AFFAIRS
(See also Indian Probate)

GENERALLY

The Bureau of Indian Affairs is bound by the terms of leases it has approved, when the leases are not in conflict with governing regulations.

American Indian Land Development Corp. v. Sacramento Area Director, Bureau of Indian Affairs, 23 IBIA 208 (Feb. 25, 1993)

The BIA is bound by the terms of leases it has approved, when the leases are not in conflict with governing regulations. Specifically, the parties can agree to extend the period established in 25 CFR 162.14 during which a breach of a lease can be cured.

Nevaco, Inc. & Pyramid Lake Paiute Tribe of Indians v. Acting Phoenix Area Director, Bureau of Indian Affairs, 24 IBIA 157 (Aug. 31, 1993)

In order to correct prior error, an official of the BIA may change an administrative interpretation of a statute as long as the reason for the change is clearly set forth to show that the departure from the prior administrative position is not arbitrary or capricious.

Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 169 (Aug. 31, 1993)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS

Generally

When the administrative record and the decision in an appeal from a BIA Area Director's decision are inadequate to support the decision, the decision will be vacated and the case remanded for development of an adequate record and issuance of a new decision.

White Earth Band of Chippewa Indians v. Minneapolis Area Director, Bureau of Indian Affairs, 23 IBIA 216 (Mar. 3, 1993)

When the administrative record in an appeal from a BIA Area Director's decision is inadequate to support the decision, the decision will be vacated and the case remanded for development of an adequate record and issuance of a new decision.

ZCA Gas Gathering, Inc. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 23 IBIA 228 (Mar. 8, 1993)

The regulations in 25 CFR Part 2 do not require a BIA Area Director, before whom an appeal is pending, to provide advance notice that he expects to address an issue not decided by the Superintendent or raised by the parties. However, when resolution of the new issue depends upon facts which may not be reflected in the record as originally constituted, the Area Director has an obligation to seek out any additional relevant documents and to advise the parties, in accordance with 25 CFR 2.21(b), that he intends to consider them.

Lower Peoples Creek Cooperative v. Acting Billings Area Director, Bureau of Indian Affairs, 23 IBIA 297 (Apr. 22, 1993)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Generally--Continued

Where an appeal procedure for certain decisions under the Indian Self-Determination Act appears only in the BIA Manual, and is not required either by statute or regulation, an appellant may waive the procedure in the Manual and proceed under the Bureau's general appeal regulations in 25 CFR Part 2.

Kaw Nation v. Anadarko Area Director, Bureau of Indian Affairs, 24 IBIA 21 (May 26, 1993)

In cases arising under 25 CFR 2.8, challenging the failure of a BIA official to issue a decision, the burden is on the Bureau either to show that the failure was justified or to present and support a position that the official could have taken.

United Auburn Indian Community v. Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 33 (May 28, 1993)

Inclusion of a copy of 25 CFR Part 2 with a decision issued by a BIA Superintendent, although an excellent practice, does not replace the written statement of appeal rights that is required under 25 CFR 2.7(c).

Nevaco, Inc. & Pyramid Lake Paiute Tribe of Indians v. Acting Phoenix Area Director, Bureau of Indian Affairs, 24 IBIA 157 (Aug. 31, 1993)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Generally--Continued

When an appellant before the BIA makes repetitious appeals, the Bureau deciding official may summarily dispose of any issues which have been fully addressed in earlier appeals.

Under 25 CFR 2.18, BIA deciding officials have authority to consolidate appeals pending before them when the appeals involve common questions of law or fact.

Pat Hayes v. Anadarko Area Director, Bureau of Indian Affairs, 25 IBIA 50 (Nov. 30, 1993)

Discretionary Decisions

Even in the case of a decision based on the exercise of discretion, BIA has a responsibility to explain the rationale and factual basis of the decision.

ZCA Gas Gathering, Inc. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 23 IBIA 228 (Mar. 8, 1993)

Even in the case of a decision based on the exercise of discretionary authority, the BIA has a responsibility to explain the rationale and factual basis of the decision.

Kaw Nation v. Anadarko Area Director, Bureau of Indian Affairs, 24 IBIA 21 (May 26, 1993)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Discretionary Decisions--Continued

Where a tribal constitution gives a BIA official authority to approve or disapprove amendments, and no limitations are placed on that authority by the constitution or by Federal statute, the Bureau official has the discretion to disapprove an amendment which would remove the requirement for approval of future amendments.

Seminole Nation of Oklahoma v. Acting Director, Office of Tribal Services, Bureau of Indian Affairs, 24 IBIA 209 (Sept. 23, 1993)

Decisions concerning whether or not to grant a lease of trust or restricted land are committed to the discretion of BIA. It is not the Board's function, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Vincent Blackhawk v. Billings Area Director, Bureau of Indian Affairs, 24 IBIA 275 (Oct. 21, 1993)

Under 25 CFR 162.2(a)(4), the BIA has discretion in determining whether to approve a proposed lease of trust or restricted property when the owners have not agreed to a lease.

Joe Brooks v. Muskogee Area Director, Bureau of Indian Affairs, 25 IBIA 31 (Nov. 12, 1993)

COAL LEASES AND PERMITS
(See also Mineral Leasing Act)

APPLICATIONS

The revised regulations governing preference right coal lease applications, first promulgated in 1976 with retroactive effect, apply to BLM's adjudication of pending preference right coal lease applications even though the applicant asserts that he completed the exploration required by his coal prospecting permits in 1970, applied for the preference right coal leases in 1972, and complied with the regulatory standards in effect at the time the applications were filed.

Eugene Stevens, 126 IBLA 357 (June 29, 1993)

LEASES

The revised regulations governing preference right coal lease applications, first promulgated in 1976 with retroactive effect, apply to BLM's adjudication of pending preference right coal lease applications even though the applicant asserts that he completed the exploration required by his coal prospecting permits in 1970, applied for the preference right coal leases in 1972, and complied with the regulatory standards in effect at the time the applications were filed.

Eugene Stevens, 126 IBLA 357 (June 29, 1993)

TERMINATION

Federal coal leases are properly terminated for failure to produce coal in commercial quantities at the end of 10 years. Where the coal lessee has been unsuccessful in his attempts to obtain a suspension of the term of the lease, this deadline cannot be extended.

Alfred G. Hoyl, 127 IBLA 297 (Oct. 7, 1993)

COLOR OR CLAIM OF TITLE

GENERALLY

A class 1 color-of-title claim requires proof that the land has been held in good faith and in peaceful adverse possession by a claimant, his ancestors, or grantors for more than 20 years, under claim or color of title based on a document from a party other than the United States which on its face purports to convey the claimed land to the applicant or the applicant's predecessors, and that valuable improvements have been placed on the land or some part of the land has been reduced to cultivation. An applicant under the color of Title Act has the burden of proof to establish to the Secretary of the Interior's satisfaction that the statutory requirements for purchase under the Act have been met, and a failure to carry the burden of proof with respect to one of the requirements is fatal to the application.

Because there can be no peaceful, adverse possession where the applicant's chain of title commences at a time when the land was withdrawn or reserved for Federal purposes, a color-of-title application is properly rejected where the applicant fails to produce a document which on its face purports to convey the claimed land prior to the time the land was reserved as a national forest.

Shirley & Pearl Warner, 125 IBLA 143 (Jan. 15, 1993)

An essential element of a color-of-title claim is the good faith requirement. Good faith is not established where a color-of-title applicant bases his ownership in part on a quitclaim deed issued to him some 18 months after the applicant learned that he did not have clear title. An applicant does not have good faith where he knows that the lands applied for were never patented by the Federal Government.

Under 43 U.S.C. § 1068(b) (1988), a class 2 color-of-title claim requires, inter alia, that the tract applied for has been held in peaceful, adverse possession by the claimant, his ancestors, or grantors,

COLOR OR CLAIM OF TITLE--Continued

GENERALLY--Continued

under color or claim of title for a period commencing not later than Jan. 1, 1901, to the date of application. Where the chain of title is interrupted by a tax sale of the land in 1958, a new title is initiated for purposes of determining when claim or color-of-title commenced, and the class 2 claim is properly rejected.

Thomas Doyle Jones, Jr., 125 IBLA 230 (Feb. 11, 1993)

A claim under the Color of Title Act, 43 U.S.C. § 1068 (1988), has not been held in peaceful, adverse possession where it was initiated while the land was withdrawn or reserved for Federal purposes.

James E. Gaylord, Jr., 125 IBLA 247 (Feb. 11, 1993)

Where BLM's determination that a class 1 color-of-title applicant has failed to show that valuable improvements have been placed on the land or that some part of the land has been reduced to cultivation is based on its review of the application and a field examination, but the record is unclear whether BLM properly considered whether the applicant's silvi-cultural activities support a claim that valuable improvements have been placed on the land, its decision rejecting the color-of-title application will be set aside and the application remanded for further consideration.

Ralph E. Williamson, 125 IBLA 255 (Feb. 16, 1993)

COLOR OR CLAIM OF TITLE--Continued

GENERALLY--Continued

A BLM decision rejecting a class 1 color-of-title application on the ground that no valuable improvements have been placed on the land will be reversed where the applicant's fencing of the parcel and his noxious weed control program have enhanced the value of the land by promoting its use for grazing.

Math Warmesbecker, 127 IBLA 47 (July 15, 1993)

APPLICATIONS

A class 1 color-of-title claim requires proof that the land has been held in good faith and in peaceful adverse possession by a claimant, his ancestors, or grantors for more than 20 years, under claim or color of title based on a document from a party other than the United States which on its face purports to convey the claimed land to the applicant or the applicant's predecessors, and that valuable improvements have been placed on the land or some part of the land has been reduced to cultivation. An applicant under the color of Title Act has the burden of proof to establish to the Secretary of the Interior's satisfaction that the statutory requirements for purchase under the Act have been met, and a failure to carry the burden of proof with respect to one of the requirements is fatal to the application.

Because there can be no peaceful, adverse possession where the applicant's chain of title commences at a time when the land was withdrawn or reserved for Federal purposes, a color-of-title application is properly rejected where the applicant fails to produce a document which on its face purports to convey the claimed land prior to the time the land was reserved as a national forest.

A class 1 color-of-title application must be rejected where no valuable improvements have been placed

COLOR OR CLAIM OF TITLE--Continued

APPLICATIONS--Continued

on the land and no part of the land has been reduced to cultivation.

Shirley & Pearl Warner, 125 IBLA 143 (Jan. 15, 1993)

An essential element of a color-of-title claim is the good faith requirement. Good faith is not established where a color-of-title applicant bases his ownership in part on a quitclaim deed issued to him some 18 months after the applicant learned that he did not have clear title. An applicant does not have good faith where he knows that the lands applied for were never patented by the Federal Government.

Under 43 U.S.C. § 1068(b) (1988), a class 2 color-of-title claim requires, inter alia, that the tract applied for has been held in peaceful, adverse possession by the claimant, his ancestors, or grantors, under color or claim of title for a period commencing not later than Jan. 1, 1901, to the date of application. Where the chain of title is interrupted by a tax sale of the land in 1958, a new title is initiated for purposes of determining when claim or color-of-title commenced, and the class 2 claim is properly rejected.

Thomas Doyle Jones, Jr., 125 IBLA 230 (Feb. 11, 1993)

A BLM decision rejecting a class 1 color-of-title application on the ground that no valuable improvements have been placed on the land will be reversed where the applicant's fencing of the parcel and his noxious weed control program have enhanced the value of the land by promoting its use for grazing.

Math Warmesbecker, 127 IBLA 47 (July 15, 1993)

COLOR OR CLAIM OF TITLE--Continued

CULTIVATION

A class 1 color-of-title application must be rejected where no valuable improvements have been placed on the land and no part of the land has been reduced to cultivation.

Shirley & Pearl Warner, 125 IBLA 143 (Jan. 15, 1993)

Where BLM's determination that a class 1 color-of-title applicant has failed to show that valuable improvements have been placed on the land or that some part of the land has been reduced to cultivation is based on its review of the application and a field examination, but the record is unclear whether BLM properly considered whether the applicant's silvicultural activities support a claim that valuable improvements have been placed on the land, its decision rejecting the color-of-title application will be set aside and the application remanded for further consideration.

Ralph E. Williamson, 125 IBLA 255 (Feb. 16, 1993)

GOOD FAITH

An essential element of a color-of-title claim is the good faith requirement. Good faith is not established where a color-of-title applicant bases his ownership in part on a quitclaim deed issued to him some 18 months after the applicant learned that he did not have clear title. An applicant does not have good faith where he knows that the lands applied for were never patented by the Federal Government.

Thomas Doyle Jones, Jr., 125 IBLA 230 (Feb. 11, 1993)

COLOR OR CLAIM OF TITLE--Continued

IMPROVEMENTS

A class 1 color-of-title application must be rejected where no valuable improvements have been placed on the land and no part of the land has been reduced to cultivation.

Shirley & Pearl Warner, 125 IBLA 143 (Jan. 15, 1993)

Where BLM's determination that a class 1 color-of-title applicant has failed to show that valuable improvements have been placed on the land or that some part of the land has been reduced to cultivation is based on its review of the application and a field examination, but the record is unclear whether BLM properly considered whether the applicant's silvicultural activities support a claim that valuable improvements have been placed on the land, its decision rejecting the color-of-title application will be set aside and the application remanded for further consideration.

Ralph E. Williamson, 125 IBLA 255 (Feb. 16, 1993)

A BLM decision rejecting a class 1 color-of-title application on the ground that no valuable improvements have been placed on the land will be reversed where the applicant's fencing of the parcel and his noxious weed control program have enhanced the value of the land by promoting its use for grazing.

Math Warmesbecker, 127 IBLA 47 (July 15, 1993)

COMMUNICATION SITES

A BLM increase in the rental charge for a communication site right-of-way is properly affirmed where the holder of the right-of-way fails to establish that the appraisal upon which the increase is based incorrectly determined the fair market rental value of the right-of-way. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of the right-of-way rental or the appellant demonstrates that the resulting charges are excessive. Absent a showing of error in the appraisal methods, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Quality Broadcasting Corp., Unicom Broadcasting, Inc.,
126 IBLA 174 (May 11, 1993)

CONSTITUTIONAL LAW

GENERALLY

"Ex post facto law." The term "ex post facto law" in the Indian Civil Rights Act of 1968, 26 U.S.C. § 1302(9) (1988), should not be given a broader interpretation than the same term in the Constitution of the U.S., Art. I, sec. 9, cl. 3, and sec. 10, cl. 1.

Janie Jovita Flores et al. v. Acting Anadarko Area
Director, Bureau of Indian Affairs, 25 IBIA 6 (Nov. 12,
1993)

CONSTITUTIONAL LAW--Continued

GENERALLY--Continued

IBLA has no authority to declare sec. 10(a) of OCSLA, 43 U.S.C. § 1339(a) (1988), or any other act of Congress unconstitutional. If an enactment of Congress is in conflict with the U.S. Constitution, it is for the Judicial Branch to so declare.

Amerada Hess Corp., 128 IBLA 94 (Dec. 13, 1993)

CONTESTS AND PROTESTS

(See also Administrative Procedure, Rules of Practice)

GENERALLY

Under sec. 905(a)(5)(C) of ANILCA, 43 U.S.C. § 1634(a)(5)(C) (1988), any individual objecting to the approval of a Native allotment application must file a protest within the period established by ANILCA and must allege that the land described in the application is the situs of improvements claimed by the person filing the protest. Where an individual files a protest after the statutory deadline, the protest is properly dismissed.

Marshall McManus, 126 IBLA 168 (May 11, 1993)

A decision by BLM denying a protest of a timber sale may be affirmed where the SOR filed in support of an appeal merely repeats, with little change, arguments raised in the protest and fails to present any new issues or point out any error in the decision appealed from, and the BLM decision is comprehensive and fully addresses each of the arguments contained in the protest.

In Re Eastside Salvage Timber Sale, 128 IBLA 114 (Dec. 20, 1993)

CONTESTS AND PROTESTS--Continued

GOVERNMENT CONTESTS

An ALJ's conclusion that a Native allotment applicant commenced qualifying use and occupancy of the claimed land prior to the effective date of a withdrawal of the land will be upheld on appeal where the conclusion is based upon a review of all the evidence presented at a hearing and the Judge's resolution of disputed facts is necessarily influenced by his consideration of the credibility of the witnesses testifying at the hearing.

A Government contest of a Native allotment application based on a charge of failure to use and occupy the land to the potential exclusion of others is properly dismissed where the Native shows by a preponderance of the evidence, presented through his testimony and that of numerous witnesses, that his use and occupancy of various improvements on the site for fall hunting purposes were, in fact, at least potentially exclusive of others.

United States v. Edward N. O'Leary, 125 IBLA 235
(Feb. 11, 1993)

CONTRACTS

(See also Appeals, Claims Against the United States,
Delegation of Authority, Labor, Rules of Practice)

GENERALLY

The relationship between Departmental bureaus and nonprofit organizations are neither contractual nor agency relationships giving rise to inappropriate obligations prior to the commitment of resources for acquisition.

Authority exists to pay overhead and administration costs of the nonprofit organizations.

CONTRACTS--Continued

GENERALLY--Continued

No authority exists for bureaus to pay interest for income foregone as a result of the acquisition by non-profit organizations.

While option costs are utilized by nonprofit organizations, and have resulted in payments in excess of costs from bureaus to the nonprofit organizations, the arrangements are legal. The interaction of non-profit organizations and Departmental bureaus does not give rise to a Federal advisory committee relationship.

Inspector General's Report on Land Acquisitions, M-36974
(July 30, 1992) 100 I.D. 195

The starting point for understanding a contract is the language of the document.

Nevaco, Inc. & Pyramid Lake Paiute Tribe of Indians v. Acting Phoenix Area Director, Bureau of Indian Affairs,
24 IBIA 157 (Aug. 31, 1993)

CONSTRUCTION AND OPERATION

Generally

Both the Changes and the Termination for Convenience clauses provide a mechanism for the deletion of contract work. However, when major portions of the contract work are deleted, the Termination for Convenience clause is more appropriate if no additional work is substituted in its place.

Appeal of Manis Drilling, IBCA-2658 (Mar. 11, 1993)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Generally--Continued

Reading all contract provisions in harmony, the Board found that the contract provided for the construction of temporary access roads.

Appeals of Michael-Mark Ltd., IBCA-2697 (Oct. 1, 1993)
100 I.D. 329

Actions of Parties

Where a contract was silent as to when the Notice to Proceed would be issued, but the solicitation stated that the Notice to Proceed would be issued upon receipt of properly executed performance and payment bonds, the Government had an implied obligation to issue the Notice to Proceed within a reasonable time after receiving the bonds.

In an action for delay under the Suspension of Work clause, the Board concluded that a 15-day delay by the Government in issuing the Notice to Proceed was reasonably prompt, where the contractor was also found to be responsible for an 11-day delay in submitting its performance and payment bonds.

Appeal of Manis Drilling, IBCA-2658 (Mar. 11, 1993)

When a combination of actions and inactions by BOR and by the A/E, which was paid by its client irrigation district, but which also served as BOR's authorized representative in administering the contract, resulted in non-objective treatment and hindered the contractor's work, the Board found that BOR had breached its duty to cooperate, causing a constructive change.

In awarding appellant a 370-day time extension, the Board resolved credibility issues in its favor and found that it had proved, with expert testimony and analysis,

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Actions of Parties--Continued

that specific delays were due to actions or inactions for which BOR was responsible; that Project completion was delayed as a result; and that BOR had not proved any overall Project delay by appellant.

Because BOR had instructed during the contract that 1986 AGC equipment ownership and operating rates were to be used, and its contracting officers had used those rates for modifications, the Board found that BOR had waived a contract provision invoking ownership rates derived from 1974 AGC tables.

Appeals of Hardrives, Inc., IBCA-2319 (Aug. 4, 1993)
100 I.D. 215

In connection with BLM's unilateral price reduction on a contract for the construction of a fishway, due to the contractor's use of a temporary access spur, rather than highline access allegedly required by the contract, the Board noted that BLM's focus during the project had not been upon the spur, but upon its concern that in-stream fill would exceed the amount specified in permits issued to BLM. In fact, the contract provided that the amount was an estimate and that BLM would modify the permits to conform to actual quantities; the permit issuers were not concerned; and the permits were amended rapidly.

The Board found that BLM impliedly had approved the contractor's temporary access spur plan, which it had presented to the COR well before construction began, and which was within the COR's contract authority to approve; for which the contractor had obtained necessary permits, which the COR had approved; and which the COR and BLM's inspector had observed in operation and allowed to continue until the spur was 90 percent complete. The Board also found that the contractor would not experience a windfall because its bid had not been based upon the use of highline access at the area

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Actions of Parties--Continued

in question; and that BLM had failed to prove its deduction justified.

In denying the contractor's claims for acceleration and impact, the Board found that the contractor had been allowed to start work earlier, and finish it later, than the contract-specified dates; deleted work had netted more time for the contractor; a suspend work order had been issued due to the contractor's own actions in violating in-stream fill permits; the suspension had applied to only part of the contract work; delay in the grant of an extension for in-stream work due to differing site conditions had not been BLM's fault; and the contractor already had been compensated by the Board's jury verdict for extra time and costs due to the differing conditions.

Appeals of Michael-Mark Ltd., IBCA-2697 (Oct. 1, 1993)
100 I.D. 329

Allowable Costs

Once the propriety of a termination for convenience has been established, the terminated portion of the contract is converted into a cost-reimbursement contract, and the contractor is entitled to recover its allowable costs in accordance with the standards of reasonableness, cost allocability, and other cost principles set forth in the FAR, including profit.

Pursuant to applicable provisions of FAR, a contractor may recover its consulting fees under a contract terminated for convenience, where the evidence showed that such costs were adequately documented and were not related to the preparation of litigation.

Appeal of Manis Drilling, IBCA-2658 (Mar. 11, 1993)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changed Conditions_(Differing Site_Conditions)

When BLM acknowledged liability for site profile differences, and the contractor proved costs incurred in addition to those awarded by unilateral modification, the Board used a jury verdict approach to determine the appropriate amount of increased costs to be recovered. In so doing, the Board found clear proof of injury; that there was no more reliable method for computing damages; and that the evidence was sufficient to make a fair and reasonable approximation of the damages.

In resolving the parties' quantum dispute over a unilateral modification which increased the contract amount due to additional work, but reduced it due to the deletion of boulder work, for an overall net price reduction, the Board found that BLM had not met its burden to prove the full amount of the reduction justified, and that the contractor had not proved the full amount it sought due to the increased work warranted. The Board used a jury verdict method in arriving at the appropriate contract adjustment.

The Board found the contractor entitled to an equitable adjustment for "Type I" differing site conditions when the contractor established that it had encountered mud seams, rotten seams, or clay, while the contract, upon which the contractor reasonably had relied, and the contractor's site visit, had indicated only competent rock. The Board used a jury verdict method to determine the proper amount of the equitable adjustment.

In denying the contractor's claims for acceleration and impact, the Board found that the contractor had been allowed to start work earlier, and finish it later, than the contract-specified dates; deleted work had netted more time for the contractor; a suspend work order had been issued due to the contractor's own actions in violating in-stream fill permits; the suspension had applied to only part of the contract work; delay in the grant of an extension for in-stream work due to differing site conditions had not been BLM's fault; and the contractor already had been compensated by the Board's

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changed Conditions_(Differing Site Conditions)--Continue

jury verdict for extra time and costs due to the differing conditions.

Appeals of Michael-Mark Ltd., IBCA-2697 (Oct. 1, 1993)
100 I.D. 329

Changes and Extras

The Board found that appellant contractor, under a BOR contract for canal construction for an irrigation district, had proved specifications, prepared by an A/E firm hired by the district, to be defective. Earthwork elevations were erroneous due to inadequate survey information; they also had been altered arbitrarily without notice; and the estimated borrow quantity, while appearing to a reasonable bidder to be overstated, was greatly underestimated. Borrow quantities provided by the A/E during the job continued to be materially inaccurate. The defective specifications constituted a constructive change compensable under the contract's Changes clause.

Appellant established many discrepancies and design errors affecting structures work and amounting to a constructive change.

When a combination of actions and inactions by BOR and by the A/E, which was paid by its client irrigation district, but which also served as BOR's authorized representative in administering the contract, resulted in non-objective treatment and hindered the contractor's work, the Board found that BOR had breached its duty to cooperate, causing a constructive change.

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changes and Extras--Continued

In awarding appellant an equitable adjustment under the Changes clause for complying with an order to repair storm damage caused by defective specifications, when BOR disputed quantum only, the Board found appellant's proof persuasive.

When BOR acknowledged liability for a contract change due to defective specifications, albeit contested appellant's quantum claim for lowering and extending a siphon, the Board accepted conservative cost estimates made by appellant's onsite project manager in the absence of any cost-effective way of segregating extra costs.

On appellant's claim for excess costs due to defective soil stabilization specifications, the Board found that contemporaneous documentation supported the testimony of appellant's project manager and BOR's inspector that, although the stabilization solution penetration requirement had been waived, appellant had been directed to use the full contract estimated quantity of solution which it had on hand. In finding appellant entitled to an equitable adjustment under the Changes clause, the Board resolved credibility issues in its favor.

When entitlement to compensation for complying with a direction to perform extra sump and wells work was undisputed, the Board awarded appellant an equitable adjustment.

Appeals of Hardrives, Inc., IBCA-2319 (Aug. 4, 1993)
100 I.D. 215

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Contract_Clauses

Both the Changes and the Termination for Convenience clauses provide a mechanism for the deletion of contract work. However, when major portions of the contract work are deleted, the Termination for Convenience clause is more appropriate if no additional work is substituted in its place.

Appeal of Manis Drilling, IBCA-2658 (Mar. 11, 1993)

Drawings_and_Specifications

The Board found that appellant contractor, under a BOR contract for canal construction for an irrigation district, had proved specifications, prepared by an A/E firm hired by the district, to be defective. Earthwork elevations were erroneous due to inadequate survey information; they also had been altered arbitrarily without notice; and the estimated borrow quantity, while appearing to a reasonable bidder to be overstated, was greatly underestimated. Borrow quantities provided by the A/E during the job continued to be materially inaccurate. The defective specifications constituted a constructive change compensable under the contract's Changes clause.

Appellant established many discrepancies and design errors affecting structures work and amounting to a constructive change.

In awarding appellant an equitable adjustment under the Changes clause for complying with an order to repair storm damage caused by defective specifications, when BOR disputed quantum only, the Board found appellant's proof persuasive.

When BOR acknowledged liability for a contract change due to defective specifications, albeit contested appellant's quantum claim for lowering and extending a siphon, the Board accepted conservative cost estimates

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Drawings and Specifications--Continued

made by appellant's onsite project manager in the absence of any cost-effective way of segregating extra costs.

On appellant's claim for excess costs due to defective soil stabilization specifications, the Board found that contemporaneous documentation supported the testimony of appellant's project manager and BOR's inspector that, although the stabilization solution penetration requirement had been waived, appellant had been directed to use the full contract estimated quantity of solution which it had on hand. In finding appellant entitled to an equitable adjustment under the Changes clause, the Board resolved credibility issues in its favor.

In denying appellant's claim for the costs of placing sealant in transverse contraction joints, the Board found that the specifications and drawings both plainly required it. Therefore, the contract's order of precedence provision, relied upon by appellant when it elected not to place sealant, did not absolve it from its duty of inquiry.

When it was undisputed that certain progress payments had been late and some Prompt Payment Act interest was due, the Board awarded it based upon dates established in an Independent Government Estimate because it provided the best-supported evidence of when the "proper" invoices required by the contract had been received.

The Board found that the contract clearly required contractors to include the cost of certain borrow area royalties in their bids, as appellant and its subcontractor had done, and denied appellant's claim to recover them.

Appeals of Hardrives, Inc., IBCA-2319 (Aug. 4, 1993)
100 I.D. 215

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Duty to Inquire

In bidding on contracts, potential contractors must seek clarification of obvious, gross, and glaring errors in the Government's specifications; but they are not expected to exercise clairvoyance in spotting hidden ambiguities. Thus, a contractor is not liable for failing to realize that the Government's estimate of the lead content of paint to be removed from an old gantry crane had omitted a zero, when the number set forth was also reasonable, even though it clearly contained an apparently misplaced comma.

Appeal of Foothill Engineering, IBCA-3119-A (Feb. 12, 1993) 100 I.D. 50

Absent clear proof that BOR was responsible for a concrete slab that had to be removed, the Board deducted the removal costs from costs charged to BOR. The Board also deducted the costs of correcting one-gate turnouts to two gates because, even if the drawings were deemed latently ambiguous, appellant had not met its burden to prove that it had relied upon its interpretation at the time of bid. Also, the contract called for inquiry in the event of drawing discrepancies. Although the turnouts had been installed under inspectors' oversight, there was no evidence that they had been aware of the error and, under the Inspection of Construction clause, they could not waive contract requirements.

In denying appellant's claim for the costs of removing and encasing banded mitered pipe bends, the Board found that the contract required encasement; even if the contract were deemed patently or latently ambiguous, appellant had not met its pre-bid duty of inquiry, or its burden to prove reliance at the time of bid, respectively. Appellant also failed to prove that banded bends had been approved as an alternative design

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Duty to Inquire--Continued

and that BOR was estopped from requiring encasement or that BOR's enforcement of the specifications constituted economic waste.

In denying appellant's claim for the costs of placing sealant in transverse contraction joints, the Board found that the specifications and drawings both plainly required it. Therefore, the contract's order of precedence provision, relied upon by appellant when it elected not to place sealant, did not absolve it from its duty of inquiry.

Appeals of Hardrives, Inc., IBCA-2319 (Aug. 4, 1993)
100 I.D. 215

General Rules of Construction

In bidding on contracts, potential contractors must seek clarification of obvious, gross, and glaring errors in the Government's specifications; but they are not expected to exercise clairvoyance in spotting hidden ambiguities. Thus, a contractor is not liable for failing to realize that the Government's estimate of the lead content of paint to be removed from an old gantry crane had omitted a zero, when the number set forth was also reasonable, even though it clearly contained an apparently misplaced comma.

Appeal of Foothill Engineering, IBCA-3119-A (Feb. 12, 1993)
100 I.D. 50

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Intent of Parties

Despite the parol evidence rule, and prior to contract interpretation, extrinsic evidence was admissible to establish that the settlement agreement was, or was not, completely integrated. The Board found appellant's several affidavits and declaration, which BIA did not controvert successfully, persuasive that the agreement was complete and final.

In finding the parties' settlement agreement clear and unambiguous, the Board derived the parties' intent from its plain language, harmonizing and giving a reasonable meaning to all of its parts, without out-of-context analysis or regard to the contracting officer's alleged intent, which BIA did not establish to be anything other than subjective and unexpressed.

Neither party could cast aside a valid settlement agreement without the most compelling of reasons, including proof of invalidity, either by fraud or mutual mistake. A unilateral mistake was not sufficient. The decision by an authorized contracting officer to settle a claim, with knowledge of the facts, was dispositive. The law assumes that the contracting officer's action in signing the agreement was proper.

Appeal of Busby School Board of the Northern Cheyenne Tribe, IBCA-3007 (Aug. 25, 1993) 100 I.D. 301

CONTRACT DISPUTES ACT OF 1978

Jurisdiction

A corporate vice president and member of the contractor's Board of Directors, who was demonstrated to have responsibility for corporate activities substantially equivalent to that of the contractor's president, qualified under FAR 33.207(c)(2)(ii) to certify the contractor's Contract Disputes Act claims as "(a)n officer

CONTRACTS--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Jurisdiction--Continued

* * * of the contractor having overall responsibility for the conduct of the contractor's affairs."

Appeals of Tecom, IBCA-2970 (Jan. 15, 1993)

100 I.D. 1

In an appeal alleging an agreement with the contracting officer settling a dispute under contracts issued pursuant to the Indian Self-Determination and Education Assistance Act, which provides that the CDA shall apply, the contracting officer's proclaimed final decision denying Busby's properly certified claim imbued the Board with jurisdiction under the CDA to determine whether the claim had been settled.

Appeal of Busby School Board of the Northern Cheyenne Tribe, IBCA-3007 (Aug. 25, 1993)

100 I.D. 301

The Board has no jurisdiction to entertain a claim for expenses incurred in Federal District Court in opposing an action by the SBA to use Federal Offset Procedures against a judgment in appellant's favor by the Board. Thus, the claim was dismissed.

Appeals of R&R Enterprises, IBCA-2833 et al. (Oct. 1, 1993)

CONTRACTS--Continued

DISPUTES AND REMEDIES

Generally

Where a contract was silent as to when the Notice to Proceed would be issued, but the solicitation stated that the Notice to Proceed would be issued upon receipt of properly executed performance and payment bonds, the Government had an implied obligation to issue the Notice to Proceed within a reasonable time after receiving the bonds.

In an action for delay under the Suspension of Work clause, the Board concluded that a 15-day delay by the Government in issuing the Notice to Proceed was reasonably prompt, where the contractor was also found to be responsible for an 11-day delay in submitting its performance and payment bonds.

Where the evidence shows that any Government-caused delay was concurrent and intertwined with delay attributable to a contractor, the latter was held to be precluded from recovering damages for delay and impact costs under the Suspension of Work clause.

Appeal of Manis Drilling, IBCA-2658 (Mar. 11, 1993)

The Government has the burden of proving that a contractor's work fails to meet specifications. Where, after due repairs to cable terminators that were found to be leaking, it rejected a fully installed, buried, high voltage a.c. electrical cable system simply because it feared that the cable might have been damaged by the leakage into it of an unknown quantity of inert insulating oil from the faulty terminators, and the purpose of the Government's rejection was simply to coerce the contractor into making additional tests that were neither specified by the contract nor recognized by the cable industry, the Government must pay the cost of the tests.

Even if the Government had a sufficient basis for its concern that a buried high voltage cable system was damaged by the leakage into it of insulating oil from

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Generally--Continued

defective cable terminators, it could not require the contractor to perform additional tests that were not consistent with industry standards and that both the contractor and the Government subsequently agreed were not reliable, unless it paid for the tests.

Appeal of Centric/Jones Constructors, IBCA-3139 (Oct. 1, 1993)

Burden of Proof

In cases seeking an equitable adjustment in the contract price, a contractor must prove the amount to which it is entitled by a preponderance of the evidence.

Although the Board recognized that a contractor's fixed expenses may not have been lessened as a result of a termination for convenience, it was incumbent upon the contractors to keep adequate records on all aspects of its costs. Since it failed to do so, there was an insufficient basis for a jury verdict award, and the Board was not otherwise disposed to presumptions favorable to the contractor.

Where a contractor seeks recovery for delay costs under the Suspension of Work clause, it has the burden of proving that any Government-caused delay was unreasonable, and that it adversely affected the contractor's performance schedule.

Appeal of Manis Drilling, IBCA-2658 (Mar. 11, 1993)

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden_of Proof--Continued

In awarding appellant a 370-day time extension, the Board resolved credibility issues in its favor and found that it had proved, with expert testimony and analysis, that specific delays were due to actions or inactions for which BOR was responsible; that Project completion was delayed as a result; and that BOR had not proved any overall Project delay by appellant.

When the evidence established BOR's liability and: (1) the impracticability of proving actual losses directly; (2) the reasonableness of the contractor's bid; (3) the reasonableness of its actual costs; and (4) its lack of responsibility for added costs, the Board found the appellant justified in using the modified total cost method for its quantum proof.

When the contractor met its burden to prove that compensable delay occurred, and that it could not take on other jobs during the contract period and, at hearing, BOR did not contest use of the Eichleay formula to compute unabsorbed overhead, the Board found that the daily figure used by both parties was appropriate.

Absent clear proof that BOR was responsible for a concrete slab that had to be removed, the Board deducted the removal costs from costs charged to BOR. The Board also deducted the costs of correcting one-gate turnouts to two gates because, even if the drawings were deemed latently ambiguous, appellant had not met its burden to prove that it had relied upon its interpretation at the time of bid. Also, the contract called for inquiry in the event of drawing discrepancies. Although the turnouts had been installed under inspectors' oversight, there was no evidence that they had been aware of the error and, under the Inspection of Construction clause, they could not waive contract requirements.

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

In awarding appellant an equitable adjustment under the Changes clause for complying with an order to repair storm damage caused by defective specifications, when BOR disputed quantum only, the Board found appellant's proof persuasive.

When BOR acknowledged liability for a contract change due to defective specifications, albeit contested appellant's quantum claim for lowering and extending a siphon, the Board accepted conservative cost estimates made by appellant's onsite project manager in the absence of any cost-effective way of segregating extra costs.

On appellant's claim for excess costs due to defective soil stabilization specifications, the Board found that contemporaneous documentation supported the testimony of appellant's project manager and BOR's inspector that, although the stabilization solution penetration requirement had been waived, appellant had been directed to use the full contract estimated quantity of solution which it had on hand. In finding appellant entitled to an equitable adjustment under the Changes clause, the Board resolved credibility issues in its favor.

In denying appellant's claim for the costs of removing and encasing banded mitered pipe bends, the Board found that the contract required encasement; even if the contract were deemed patently or latently ambiguous, appellant had not met its pre-bid duty of inquiry, or its burden to prove reliance at the time of bid, respectively. Appellant also failed to prove that banded bends had been approved as an alternative design and that BOR was estopped from requiring encasement or that BOR's enforcement of the specifications constituted economic waste.

When it was undisputed that certain progress payments had been late and some Prompt Payment Act interest was due, the Board awarded it based upon dates established in an Independent Government Estimate

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden_of Proof--Continued

because it provided the best-supported evidence of when the "proper" invoices required by the contract had been received.

Appeals of Hardrives, Inc., IBCA-2319 (Aug. 4, 1993)
100 I.D. 215

The Government has the burden of proving that a contractor's work fails to meet specifications. Where, after due repairs to cable terminators that were found to be leaking, it rejected a fully installed, buried, high voltage a.c. electrical cable system simply because it feared that the cable might have been damaged by the leakage into it of an unknown quantity of inert insulating oil from the faulty terminators, and the purpose of the Government's rejection was simply to coerce the contractor into making additional tests that were neither specified by the contract nor recognized by the cable industry, the Government must pay the cost of the tests.

Even if the Government had a sufficient basis for its concern that a buried high voltage cable system was damaged by the leakage into it of insulating oil from defective cable terminators, it could not require the contractor to perform additional tests that were not consistent with industry standards and that both the contractor and the Government subsequently agreed were not reliable, unless it paid for the tests.

Appeal of Centric/Jones Constructors, IBCA-3139 (Oct. 1, 1993)

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden_of Proof--Continued

Where the evidence shows that actions of the NPS did not cause the harm appellant complained about, but rather that appellant's own business decisions were the primary cause of its problems, appellant has failed to sustain its burden of proof and has not established entitlement to damages.

Appeals of R&R Enterprises, IBCA-2833 et al. (Oct. 1, 1993)

The Board found that BLM impliedly had approved the contractor's temporary access spur plan, which it had presented to the COR well before construction began, and which was within the COR's contract authority to approve; for which the contractor had obtained necessary permits, which the COR had approved; and which the COR and BLM's inspector had observed in operation and allowed to continue until the spur was 90 percent complete. The Board also found that the contractor would not experience a windfall because its bid had not been based upon the use of highline access at the area in question; and that BLM had failed to prove its deduction justified.

When BLM acknowledged liability for site profile differences, and the contractor proved costs incurred in addition to those awarded by unilateral modification, the Board used a jury verdict approach to determine the appropriate amount of increased costs to be recovered. In so doing, the Board found clear proof of injury; that there was no more reliable method for computing damages; and that the evidence was sufficient to make a fair and reasonable approximation of the damages.

In resolving the parties' quantum dispute over a unilateral modification which increased the contract amount due to additional work, but reduced it due to the deletion of boulder work, for an overall net price reduction, the Board found that BLM had not met its burden to prove the full amount of the reduction justified,

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden_of Proof--Continued

and that the contractor had not proved the full amount it sought due to the increased work warranted. The Board used a jury verdict method in arriving at the appropriate contract adjustment.

The Board found the contractor entitled to an equitable adjustment for "Type I" differing site conditions when the contractor established that it had encountered mud seams, rotten seams, or clay, while the contract, upon which the contractor reasonably had relied, and the contractor's site visit, had indicated only competent rock. The Board used a jury verdict method to determine the proper amount of the equitable adjustment.

Appeals of Michael-Mark Ltd., IBCA-2697 (Oct. 1, 1993)
100 I.D. 329

Damages

Generally

Where the evidence shows that any Government-caused delay was concurrent and intertwined with delay attributable to a contractor, the latter was held to be precluded from recovering damages for delay and impact costs under the Suspension of Work clause.

Appeal of Manis Drilling, IBCA-2658 (Mar. 11, 1993)

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Damages--Continued

Measurement

When the evidence established BOR's liability and: (1) the impracticability of proving actual losses directly; (2) the reasonableness of the contractor's bid; (3) the reasonableness of its actual costs; and (4) its lack of responsibility for added costs, the Board found the appellant justified in using the modified total cost method for its quantum proof.

Because BOR had instructed during the contract that 1986 AGC equipment ownership and operating rates were to be used, and its contracting officers had used those rates for modifications, the Board found that BOR had waived a contract provision invoking ownership rates derived from 1974 AGC tables.

When the contractor met its burden to prove that compensable delay occurred, and that it could not take on other jobs during the contract period and, at hearing, BOR did not contest use of the Eichleay formula to compute unabsorbed overhead, the Board found that the daily figure used by both parties was appropriate.

The Board held that a 10-percent profit rate was reasonable and that the Contractor Proposals clause, concerning proposals for modifications for work performed by subcontractors, and weighted profit averages derived by BOR to limit profit to 8.85 percent, did not apply.

Absent clear proof that BOR was responsible for a concrete slab that had to be removed, the Board deducted the removal costs from costs charged to BOR. The Board also deducted the costs of correcting one-gate turnouts to two gates because, even if the drawings were deemed latently ambiguous, appellant had not met its burden to prove that it had relied upon its interpretation at the time of bid. Also, the contract called for inquiry in the event of drawing discrepancies. Although the turnouts had been installed under inspectors' oversight, there was no evidence that they had been aware of the

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Damages--Continued

Measurement--Continued

error and, under the Inspection of Construction clause, they could not waive contract requirements.

In awarding appellant an equitable adjustment under the Changes clause for complying with an order to repair storm damage caused by defective specifications, when BOR disputed quantum only, the Board found appellant's proof persuasive.

When BOR acknowledged liability for a contract change due to defective specifications, albeit contested appellant's quantum claim for lowering and extending a siphon, the Board accepted conservative cost estimates made by appellant's onsite project manager in the absence of any cost-effective way of segregating extra costs.

When it was undisputed that certain progress payments had been late and some Prompt Payment Act interest was due, the Board awarded it based upon dates established in an Independent Government Estimate because it provided the best-supported evidence of when the "proper" invoices required by the contract had been received.

Appeals of Hardrives, Inc., IBCA-2319 (Aug. 4, 1993)
100 I.D. 215

Equitable Adjustments

In cases seeking an equitable adjustment in the contract price, a contractor must prove the amount to which it is entitled by a preponderance of the evidence.

Although the Board recognized that a contractor's fixed expenses may not have been lessened as a result of a termination for convenience, it was incumbent upon

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

the contractors to keep adequate records on all aspects of its costs. Since it failed to do so, there was an insufficient basis for a jury verdict award, and the Board was not otherwise disposed to presumptions favorable to the contractor.

Where a contractor seeks recovery for delay costs under the Suspension of Work clause, it has the burden of proving that any Government-caused delay was unreasonable, and that it adversely affected the contractor's performance schedule.

Appeal of Manis Drilling, IBCA-2658 (Mar. 11, 1993)

The Board found that appellant contractor, under a BOR contract for canal construction for an irrigation district, had proved specifications, prepared by an A/E firm hired by the district, to be defective. Earthwork elevations were erroneous due to inadequate survey information; they also had been altered arbitrarily without notice; and the estimated borrow quantity, while appearing to a reasonable bidder to be overstated, was greatly underestimated. Borrow quantities provided by the A/E during the job continued to be materially inaccurate. The defective specifications constituted a constructive change compensable under the contract's Changes clause.

Appellant established many discrepancies and design errors affecting structures work and amounting to a constructive change.

When a combination of actions and inactions by BOR and by the A/E, which was paid by its client irrigation district, but which also served as BOR's authorized representative in administering the contract, resulted

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

in non-objective treatment and hindered the contractor's work, the Board found that BOR had breached its duty to cooperate, causing a constructive change.

When the evidence established BOR's liability and: (1) the impracticability of proving actual losses directly; (2) the reasonableness of the contractor's bid; (3) the reasonableness of its actual costs; and (4) its lack of responsibility for added costs, the Board found the appellant justified in using the modified total cost method for its quantum proof.

Because BOR had instructed during the contract that 1986 AGC equipment ownership and operating rates were to be used, and its contracting officers had used those rates for modifications, the Board found that BOR had waived a contract provision invoking ownership rates derived from 1974 AGC tables.

When the contractor met its burden to prove that compensable delay occurred, and that it could not take on other jobs during the contract period and, at hearing, BOR did not contest use of the Eichleay formula to compute unabsorbed overhead, the Board found that the daily figure used by both parties was appropriate.

The Board held that a 10-percent profit rate was reasonable and that the Contractor Proposals clause, concerning proposals for modifications for work performed by subcontractors, and weighted profit averages derived by BOR to limit profit to 8.85 percent, did not apply.

Absent clear proof that BOR was responsible for a concrete slab that had to be removed, the Board deducted the removal costs from costs charged to BOR. The Board also deducted the costs of correcting one-gate turnouts to two gates because, even if the drawings were deemed latently ambiguous, appellant had not met its burden to prove that it had relied upon its interpretation at the time of bid. Also, the contract called for inquiry in the event of drawing discrepancies. Although the

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

turnouts had been installed under inspectors' oversight, there was no evidence that they had been aware of the error and, under the Inspection of Construction clause, they could not waive contract requirements.

In awarding appellant an equitable adjustment under the Changes clause for complying with an order to repair storm damage caused by defective specifications, when BOR disputed quantum only, the Board found appellant's proof persuasive.

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On appellant's claim for excess costs due to defective soil stabilization specifications, the Board found that contemporaneous documentation supported the testimony of appellant's project manager and BOR's inspector that, although the stabilization solution penetration requirement had been waived, appellant had been directed to use the full contract estimated quantity of solution which it had on hand. In finding appellant entitled to an equitable adjustment under the Changes clause, the Board resolved credibility issues in its favor.

When entitlement to compensation for complying with a direction to perform extra sump and wells work was undisputed, the Board awarded appellant an equitable adjustment.

Appeals of Hardrives, Inc., IBCA-2319 (Aug. 4, 1993)
100 I.D. 215

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

The Government has the burden of proving that a contractor's work fails to meet specifications. Where, after due repairs to cable terminators that were found to be leaking, it rejected a fully installed, buried, high voltage a.c. electrical cable system simply because it feared that the cable might have been damaged by the leakage into it of an unknown quantity of inert insulating oil from the faulty terminators, and the purpose of the Government's rejection was simply to coerce the contractor into making additional tests that were neither specified by the contract nor recognized by the cable industry, the Government must pay the cost of the tests.

Even if the Government had a sufficient basis for its concern that a buried high voltage cable system was damaged by the leakage into it of insulating oil from defective cable terminators, it could not require the contractor to perform additional tests that were not consistent with industry standards and that both the contractor and the Government subsequently agreed were not reliable, unless it paid for the tests.

Appeal of Centric/Jones Constructors, IBCA-3139 (Oct. 1, 1993)

When BLM acknowledged liability for site profile differences, and the contractor proved costs incurred in addition to those awarded by unilateral modification, the Board used a jury verdict approach to determine the appropriate amount of increased costs to be recovered. In so doing, the Board found clear proof of injury; that there was no more reliable method for computing damages; and that the evidence was sufficient to make a fair and reasonable approximation of the damages.

In resolving the parties' quantum dispute over a unilateral modification which increased the contract amount due to additional work, but reduced it due to the deletion of boulder work, for an overall net price

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

reduction, the Board found that BLM had not met its burden to prove the full amount of the reduction justified, and that the contractor had not proved the full amount it sought due to the increased work warranted. The Board used a jury verdict method in arriving at the appropriate contract adjustment.

The Board found the contractor entitled to an equitable adjustment for "Type I" differing site conditions when the contractor established that it had encountered mud seams, rotten seams, or clay, while the contract, upon which the contractor reasonably had relied, and the contractor's site visit, had indicated only competent rock. The Board used a jury verdict method to determine the proper amount of the equitable adjustment.

Appeals of Michael-Mark Ltd., IBCA-2697 (Oct. 1, 1993)
100 I.D. 329

Jurisdiction

A corporate vice president and member of the contractor's Board of Directors, who was demonstrated to have responsibility for corporate activities substantially equivalent to that of the contractor's president, qualified under FAR 33.207(c)(2)(ii) to certify the contractor's Contract Disputes Act claims as "(a)n officer * * * of the contractor having overall responsibility for the conduct of the contractor's affairs."

Appeals of Tecom, IBCA-2970 (Jan. 15, 1993)
100 I.D. 1

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Jurisdiction--Continued

In an appeal alleging an agreement with the contracting officer settling a dispute under contracts issued pursuant to the Indian Self-Determination and Education Assistance Act, which provides that the CDA shall apply, the contracting officer's proclaimed final decision denying Busby's properly certified claim imbued the Board with jurisdiction under the CDA to determine whether the claim had been settled.

Appeal of Busby School Board of the Northern Cheyenne Tribe, IBCA-3007 (Aug. 25, 1993) 100 I.D. 301

Termination for Convenience

Both the Changes and the Termination for Convenience clauses provide a mechanism for the deletion of contract work. However, when major portions of the contract work are deleted, the Termination for Convenience clause is more appropriate if no additional work is substituted in its place.

Once the propriety of a termination for convenience has been established, the terminated portion of the contract is converted into a cost-reimbursement contract, and the contractor is entitled to recover its allowable costs in accordance with the standards of reasonableness, cost allocability, and other cost principles set forth in the FAR, including profit.

Pursuant to applicable provisions of FAR, a contractor may recover its consulting fees under a contract terminated for convenience, where the evidence showed that such costs were adequately documented and were not related to the preparation of litigation.

Appeal of Manis Drilling, IBCA-2658 (Mar. 11, 1993)

CONTRACTS--Continued

FORMATION AND VALIDITY

Generally

To prove an express contract with BIA, appellant had to establish mutual intent to be bound; the authority of BIA's representative; and consideration. Because compromise of a disputed claim was involved, accord and satisfaction principles were relevant: proper subject matter, competent parties, meeting of the minds, and consideration reflected by a bona fide dispute.

Despite the parol evidence rule, and prior to contract interpretation, extrinsic evidence was admissible to establish that the settlement agreement was, or was not, completely integrated. The Board found appellant's several affidavits and declaration, which BIA did not controvert successfully, persuasive that the agreement was complete and final.

In finding the parties' settlement agreement clear and unambiguous, the Board derived the parties' intent from its plain language, harmonizing and giving a reasonable meaning to all of its parts, without out-of-context analysis or regard to the contracting officer's alleged intent, which BIA did not establish to be anything other than subjective and unexpressed.

Neither party could cast aside a valid settlement agreement without the most compelling of reasons, including proof of invalidity, either by fraud or mutual mistake. A unilateral mistake was not sufficient. The decision by an authorized contracting officer to settle a claim, with knowledge of the facts, was dispositive. The law assumes that the contracting officer's action in signing the agreement was proper.

Appeal of Busby School Board of the Northern Cheyenne Tribe, IBCA-3007 (Aug. 25, 1993) 100 I.D. 301

CONTRACTS--Continued

FORMATION AND VALIDITY--Continued

Authority to Make

There was no genuine dispute that the settlement's subject matter was proper and that the officials executing the agreement were authorized.

Appeal of Busby School Board of the Northern Cheyenne Tribe, IBCA-3007 (Aug. 25, 1993) 100 I.D. 301

Consideration

When appellant established that it believed that it had a legitimate claim for an amount in excess of the settlement amount, the settlement was supported by consideration.

Appeal of Busby School Board of the Northern Cheyenne Tribe, IBCA-3007 (Aug. 25, 1993) 100 I.D. 301

Formalities

BIA conceded that no format was required for the settlement agreement. Provisions of the FAR calling for the execution of a particular form for an agreement modifying a contract were irrelevant because the FAR does not apply to Self-Determination Act contracts such as those in question and contract modifications were not at issue in any case.

Appeal of Busby School Board of the Northern Cheyenne Tribe, IBCA-3007 (Aug. 25, 1993) 100 I.D. 301

CONTRACTS--Continued

FORMATION AND VALIDITY--Continued

Mistakes

In bidding on contracts, potential contractors must seek clarification of obvious, gross, and glaring errors in the Government's specifications; but they are not expected to exercise clairvoyance in spotting hidden ambiguities. Thus, a contractor is not liable for failing to realize that the Government's estimate of the lead content of paint to be removed from an old gantry crane had omitted a zero, when the number set forth was also reasonable, even though it clearly contained an apparently misplaced comma.

Appeal of Foothill Engineering, IBCA-3119-A (Feb. 12, 1993) 100 I.D. 50

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

Generally

Where an appeal procedure for certain decisions under the Indian Self-Determination Act appears only in the BIA Manual, and is not required either by statute or regulation, an appellant may waive the procedure in the Manual and proceed under the Bureau's general appeal regulations in 25 CFR Part 2.

Under 25 U.S.C. § 450j-1(b)(3) (1988), the BIA is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under the Indian Self-Determination Act.

Even in the case of a decision based on the exercise of discretionary authority, the BIA has a

CONTRACTS--Continued

INDIAN SELF-DETERMINATION AND EDUCATION
ASSISTANCE ACT--Continued

Generally--Continued

responsibility to explain the rationale and factual basis of the decision.

Kaw Nation v. Anadarko Area Director, Bureau of Indian Affairs, 24 IBIA 21 (May 26, 1993)

Governing Law

In an appeal alleging an agreement with the contracting officer settling a dispute under contracts issued pursuant to the Indian Self-Determination and Education Assistance Act, which provides that the CDA shall apply, the contracting officer's proclaimed final decision denying Busby's properly certified claim imbued the Board with jurisdiction under the CDA to determine whether the claim had been settled.

Appeal of Busby School Board of the Northern Cheyenne Tribe, IBCA-3007 (Aug. 25, 1993) 100 I.D. 301

PERFORMANCE OR DEFAULT

Acceptance of Performance

The Government has the burden of proving that a contractor's work fails to meet specifications. Where, after due repairs to cable terminators that were found to be leaking, it rejected a fully installed, buried, high voltage a.c. electrical cable system simply because it feared that the cable might have been damaged by the leakage into it of an unknown quantity of inert insulating oil from the faulty terminators, and the purpose of the Government's rejection was simply to coerce the contractor into making additional tests that were neither specified by the contract nor recognized by the

CONTRACTS--Continued

PERFORMANCE OR DEFAULT--Continued

Acceptance of Performance--Continued

cable industry, the Government must pay the cost of the tests.

Even if the Government had a sufficient basis for its concern that a buried high voltage cable system was damaged by the leakage into it of insulating oil from defective cable terminators, it could not require the contractor to perform additional tests that were not consistent with industry standards and that both the contractor and the Government subsequently agreed were not reliable, unless it paid for the tests.

Appeal of Centric/Jones Constructors, IBCA-3139 (Oct. 1, 1993)

Compensable Delays

In awarding appellant a 370-day time extension, the Board resolved credibility issues in its favor and found that it had proved, with expert testimony and analysis, that specific delays were due to actions or inactions for which BOR was responsible; that Project completion was delayed as a result; and that BOR had not proved any overall Project delay by appellant.

Appeals of Hardrives, Inc., IBCA-2319 (Aug. 4, 1993)
100 I.D. 215

Excusable Delays

In denying the contractor's claims for acceleration and impact, the Board found that the contractor had been allowed to start work earlier, and finish it later, than the contract-specified dates; deleted work had netted more time for the contractor; a suspend work order had

CONTRACTS--Continued

PERFORMANCE OR DEFAULT--Continued

Excusable Delays--Continued

been issued due to the contractor's own actions in violating in-stream fill permits; the suspension had applied to only part of the contract work; delay in the grant of an extension for in-stream work due to differing site conditions had not been BLM's fault; and the contractor already had been compensated by the Board's jury verdict for extra time and costs due to the differing conditions.

Appeals of Michael-Mark Ltd., IBCA-2697 (Oct. 1, 1993)
100 I.D. 329

Inspection

The Board found that BLM impliedly had approved the contractor's temporary access spur plan, which it had presented to the COR well before construction began, and which was within the COR's contract authority to approve; for which the contractor had obtained necessary permits, which the COR had approved; and which the COR and BLM's inspector had observed in operation and allowed to continue until the spur was 90 percent complete. The Board also found that the contractor would not experience a windfall because its bid had not been based upon the use of highline access at the area in question; and that BLM had failed to prove its deduction justified.

Appeals of Michael-Mark Ltd., IBCA-2697 (Oct. 1, 1993)
100 I.D. 329

CONTRACTS--Continued

PERFORMANCE OR DEFAULT--Continued

Substantial Performance

The Government has the burden of proving that a contractor's work fails to meet specifications. Where, after due repairs to cable terminators that were found to be leaking, it rejected a fully installed, buried, high voltage a.c. electrical cable system simply because it feared that the cable might have been damaged by the leakage into it of an unknown quantity of inert insulating oil from the faulty terminators, and the purpose of the Government's rejection was simply to coerce the contractor into making additional tests that were neither specified by the contract nor recognized by the cable industry, the Government must pay the cost of the tests.

Even if the Government had a sufficient basis for its concern that a buried high voltage cable system was damaged by the leakage into it of insulating oil from defective cable terminators, it could not require the contractor to perform additional tests that were not consistent with industry standards and that both the contractor and the Government subsequently agreed were not reliable, unless it paid for the tests.

Appeal of Centric/Jones Constructors, IBCA-3139 (Oct. 1, 1993)

Waiver and Estoppel

Because BOR had instructed during the contract that 1986 AGC equipment ownership and operating rates were to be used, and its contracting officers had used those rates for modifications, the Board found that BOR had waived a contract provision invoking ownership rates derived from 1974 AGC tables.

Absent clear proof that BOR was responsible for a concrete slab that had to be removed, the Board deducted the removal costs from costs charged to BOR. The Board also deducted the costs of correcting one-gate turnouts

CONTRACTS--Continued

PERFORMANCE OR DEFAULT--Continued

Waiver_and_Estoppel--Continued

to two gates because, even if the drawings were deemed latently ambiguous, appellant had not met its burden to prove that it had relied upon its interpretation at the time of bid. Also, the contract called for inquiry in the event of drawing discrepancies. Although the turnouts had been installed under inspectors' oversight, there was no evidence that they had been aware of the error and, under the Inspection of Construction clause, they could not waive contract requirements.

In denying appellant's claim for the costs of removing and encasing banded mitered pipe bends, the Board found that the contract required encasement; even if the contract were deemed patently or latently ambiguous, appellant had not met its pre-bid duty of inquiry, or its burden to prove reliance at the time of bid, respectively. Appellant also failed to prove that banded bends had been approved as an alternative design and that BOR was estopped from requiring encasement or that BOR's enforcement of the specifications constituted economic waste.

Appeals of Hardrives, Inc., IBCA-2319 (Aug. 4, 1993)
100 I.D. 215

The Board found that BLM impliedly had approved the contractor's temporary access spur plan, which it had presented to the COR well before construction began, and which was within the COR's contract authority to approve; for which the contractor had obtained necessary permits, which the COR had approved; and which the COR and BLM's inspector had observed in operation and allowed to continue until the spur was 90 percent complete. The Board also found that the contractor would not experience a windfall because its bid had not been based upon the use of highline access at the area

CONTRACTS--Continued

PERFORMANCE OR DEFAULT--Continued

Waiver and Estoppel--Continued

in question; and that BLM had failed to prove its deduction justified.

Appeals of Michael-Mark Ltd., IBCA-2697 (Oct. 1, 1993)
100 I.D. 329

RULES OF PRACTICE

Generally

In applying its discovery rules, the Interior Board has adopted a flexible application of the term "good cause" and strongly encourages parties to engage in informal, cooperative, relevant, discovery to the extent practicable, without abusing the process.

The Board held that, consistent with the amended Federal Rules of Civil Procedure, no later than 30 days before hearing, both parties were to identify their proposed lay hearing witnesses and exhibits, and to exchange those exhibits not already in the other's possession.

Each party was to notify the other of any experts to be called at hearing as soon as those experts were identified and was to supply the other with a copy of any expert report or exhibit as soon as prepared. Without the need to request subpoenas from the Board, each party could depose the other's expert report or exhibit. In any case, expert identification and production of any expert report or exhibit was to occur no later than 60 days before hearing.

Without the need to request subpoenas from the Board, each party could notice and take the depositions

CONTRACTS--Continued

RULES OF PRACTICE--Continued

Generally--Continued

of the other's knowledgeable personnel, based upon its own analysis, and/or upon the other's response to a Fed. R. Civ. P. 30(b)(6) notice. If a party deemed the number of depositions or particular individuals to be deposed to be unreasonable, it could seek a protective order.

The Board issued rulings on interrogatories and requests for production of documents to which the Government had objected on the grounds that the requested information had been supplied through document production, or that the requests were overly broad or irrelevant. The Board agreed that some of appellant's interrogatories and document production requests were overly broad, but found others to be relevant, and directed various responses by the Government.

The Board found that disputed requests for admission were relevant and clear and directed responses.

Appeals of Federal Insurance Co., IBCA-3236 (Dec. 22, 1993) 100 I.D. 448

TRIBALLY CONTROLLED SCHOOLS ACT

Generally

The Board has jurisdiction to decide disputes arising from grants made under the Tribally Controlled Schools Act of 1988, 25 U.S.C. §§ 2501--2511.

Appeal of Rough Rock Community School Board, IBCA-3037 (Feb. 12, 1993) 100 I.D. 45

CONTRACTS--Continued

TRIBALLY CONTROLLED SCHOOLS ACT--Continued

Grants

Grant recipients under the Tribally Controlled Schools Act are not entitled to interest pursuant to the Prompt Payment Act on late payments, because the Prompt Payment Act by its terms applies only to contracts as such; and any payment of interest on the Tribally Controlled Schools Act grants would require express statutory authority, which clearly does not exist.

Appeal of Rough Rock Community School Board, IBCA-3037
(Feb. 12, 1993) 100 I.D. 45

CONVEYANCES

RESERVATIONS

Michigan law determined when title to the oil and gas estate passed to the U.S. under a grant retaining mineral title "until May 16, 1985." The conclusion that an oil and gas lease offer for acquired lands was prematurely filed on May 16, 1985, must therefore be reversed where Michigan case law indicates that ambiguity is properly construed against a grantor if it appears as a limitation on the grant.

Wilfred Plomis, 126 IBLA 68 (Apr. 14, 1993)

DELEGATION OF AUTHORITY

(See also Administrative Authority, Contracts)

Although OHA does not have authority to review the merits of biological opinions issued by the U.S. Fish & Wildlife Service under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), it has jurisdiction over an appeal from the rejection by BLM of an application for a right-of-way on the grounds that the right-of-way would destroy a Category 1 candidate species of plant and its habitat.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

OHA does not have authority to review the merits of biological opinions issued by the U.S. FWS under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988); however, an appellant's arguments concerning consistency with a biological opinion would normally be subject to review.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

DESERT LAND ENTRY

APPLICATIONS

BLM properly rejects a desert land entry application where the applicant has failed to submit proof that he has acquired, is seeking to acquire, or is qualified under state law to acquire a right to permanent use of sufficient water to irrigate and reclaim all irrigable portions of the land sought. It is not sufficient that an applicant establish that he is relying on a state water permit application of his deceased father that he

DESERT LAND ENTRY--Continued

APPLICATIONS--Continued

has not actively sought to have transferred to him and which has been denied.

Glen H. Wharton, 125 IBLA 165 (Jan. 28, 1993)

BLM properly rejected a desert land entry application for lands that were classified unsuitable for agricultural development by a final order of the Secretary of the Interior.

Keith P. Gunderson, 127 IBLA 16 (July 12, 1993)

CANCELLATION

It is proper for BLM to cancel a desert land entry when the entrant had clearly failed to demonstrate that, during the statutory life of the entry, she acquired or was taking the necessary steps to acquire the legal and physical right to sufficient water to reclaim the entered land, thus fulfilling the purpose of the Act of Mar. 3, 1877.

Anna R. Williams, Frances L. Roylance, 126 IBLA 20 (Apr. 8, 1993)

CLASSIFICATION

BLM properly rejected a desert land entry application for lands that were classified unsuitable for agricultural development by a final order of the Secretary of the Interior.

Keith P. Gunderson, 127 IBLA 16 (July 12, 1993)

DESERT LAND ENTRY--Continued

EXTENSION OF TIME

BLM properly denies a request for an extension of time to make final proof for a desert land entry, pursuant to sec. 3 of the Act of Mar. 28, 1908, 43 U.S.C. § 333 (1988), based on the entryperson's inability to construct the necessary irrigation works absent evidence that this inability arose due to circumstances not reasonably foreseeable at the time of the allowance of the entry.

Robert B. Arnold et ux., 125 IBLA 158 (Jan. 28, 1993)

FINAL PROOF

BLM properly denies a request for an extension of time to make final proof for a desert land entry, pursuant to sec. 3 of the Act of Mar. 28, 1908, 43 U.S.C. § 333 (1988), based on the entryperson's inability to construct the necessary irrigation works absent evidence that this inability arose due to circumstances not reasonably foreseeable at the time of the allowance of the entry.

Robert B. Arnold et ux., 125 IBLA 158 (Jan. 28, 1993)

It is proper for BLM to cancel a desert land entry when the entrant had clearly failed to demonstrate that, during the statutory life of the entry, she acquired or was taking the necessary steps to acquire the legal and physical right to sufficient water to reclaim the entered land, thus fulfilling the purpose of the Act of Mar. 3, 1877.

Anna R. Williams, Frances L. Roylance, 126 IBLA 20 (Apr. 8, 1993)

DESERT LAND ENTRY--Continued

LANDS SUBJECT TO

BLM properly rejected a desert land entry application for lands that were classified unsuitable for agricultural development by a final order of the Secretary of the Interior.

Keith P. Gunderson, 127 IBLA 16 (July 12, 1993)

WATER RIGHT

BLM properly rejects a desert land entry application where the applicant has failed to submit proof that he has acquired, is seeking to acquire, or is qualified under state law to acquire a right to permanent use of sufficient water to irrigate and reclaim all irrigable portions of the land sought. It is not sufficient that an applicant establish that he is relying on a state water permit application of his deceased father that he has not actively sought to have transferred to him and which has been denied.

Glen H. Wharton, 125 IBLA 165 (Jan. 28, 1993)

It is proper for BLM to cancel a desert land entry when the entrant had clearly failed to demonstrate that, during the statutory life of the entry, she acquired or was taking the necessary steps to acquire the legal and physical right to sufficient water to reclaim the entered land, thus fulfilling the purpose of the Act of Mar. 3, 1877.

Anna R. Williams, Frances L. Roylance, 126 IBLA 20 (Apr. 8, 1993)

DESERT LAND ENTRY--Continued

WATER SUPPLY

It is proper for BLM to cancel a desert land entry when the entrant had clearly failed to demonstrate that, during the statutory life of the entry, she acquired or was taking the necessary steps to acquire the legal and physical right to sufficient water to reclaim the entered land, thus fulfilling the purpose of the Act of Mar. 3, 1877.

Anna R. Williams, Frances L. Roylance, 126 IBLA 20 (Apr. 8, 1993)

ENDANGERED SPECIES ACT OF 1973

GENERALLY

Although OHA does not have authority to review the merits of biological opinions issued by the U.S. Fish & Wildlife Service under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), it has jurisdiction over an appeal from the rejection by BLM of an application for a right-of-way on the grounds that the right-of-way would destroy a Category 1 candidate species of plant and its habitat.

Denial of an application for a right-of-way on the grounds that the right-of-way would destroy plants of a Category 1 candidate species under the Endangered Species Act and its habitat will be affirmed when the decision is based on a reasoned analysis of the factors involved, made in due regard for the public interest, and no significant reason is shown to disturb the decision. A showing that there is a possible difference of scientific opinion on the issue of whether the candidate species is properly regarded as a subspecies is not sufficient to disturb BLM's decision.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

ENDANGERED SPECIES ACT OF 1973--Continued

GENERALLY--Continued

Where the FWS has already issued a formal consultation document on issuance of geothermal leases near a lake which harbors an endangered species of fish, and the FWS has continued to consult with BLM to help devise mitigating measures for geothermal lease issuance and exploratory drilling, BLM may correctly decline to request a second formal consultation for the geothermal test drilling.

Sierra Club, Inc., et al., 126 IBLA 142 (May 6, 1993)

The ESA directs agencies to "utilize their authorities" to carry out the ESA's objectives but does not expand the powers conferred by the agency's enabling Act.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

OHA does not have authority to review the merits of biological opinions issued by the U.S. FWS under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988); however, an appellant's arguments concerning consistency with a biological opinion would normally be subject to review.

Although an appellant bears the burden of demonstrating error where BLM has determined that a proposed action is not likely to affect a threatened or endangered species, the record on appeal must support BLM's action, and where BLM concludes that the drilling of a natural gas well will not affect the bald eagle because no active eyries or nests were located during the survey of the area, but the record fails to show that searches

ENDANGERED SPECIES ACT OF 1973--Continued

GENERALLY--Continued

for bald eagles were conducted in the winter and early spring when bald eagles are known to inhabit the area, BLM's determination will be set aside and the case remanded.

Where, in response to a challenge to approval of an APD to drill a natural gas well, BLM states that no special status plant species, including threatened and endangered plants, were found during a survey of the proposed project area, such a determination must be supported by the record. When the record on appeal contains no evidence of who conducted the survey, any field report, or any description of the methodology employed in making the determination, that determination will be set aside and the case remanded.

A determination by BLM that approval of an APD to drill a natural gas well will not eliminate a river from eligibility for potential inclusion within the National Wild and Scenic River System, pursuant to sec. 5(d) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1276(d) (1988), is supported by the record where there is no evidence in the record that drilling the well in question would adversely affect all the river's outstandingly remarkable values so as to render it ineligible for consideration.

Southern Utah Wilderness Alliance et al., 128 IBLA 52
(Dec. 2, 1993)

ENDANGERED SPECIES ACT OF 1973

GENERALLY

The Department and ESC staff undertook substantial and effective procedures to safeguard the integrity of this novel process. The ESC's decision is well supported by the evidentiary record. This litigation will establish important legal principles that will govern

ENDANGERED SPECIES ACT OF 1973--Continued

GENERALLY--Continued

all future ESC decisional processes under sec. 7 of the ESA.

Appellate Review of the Decision of the Endangered Species Committee: Portland Audubon Society et al. v. The Endangered Species Committee, No. 92-70436 (9th Cir.), M-36976 (Jan. 14, 1993) 100 I.D. 395

SECTION 7

Consultation

Although OHA does not have authority to review the merits of biological opinions issued by the U.S. Fish & Wildlife Service under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), it has jurisdiction over an appeal from the rejection by BLM of an application for a right-of-way on the grounds that the right-of-way would destroy a Category 1 candidate species of plant and its habitat.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

Where the record discloses that mining activities pursuant to a BLM-approved plan of operations are not likely to affect any threatened or endangered species, no formal consultation with FWS is required under sec. 7 of the ESA, 16 U.S.C. § 1536 (1988).

Nat'l Wildlife Federation et al., 126 IBLA 48 (Apr. 14, 1993)

ENDANGERED SPECIES ACT OF 1973--Continued

SECTION 7--Continued

Consultation--Continued

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

OHA does not have authority to review the merits of biological opinions issued by the U.S. FWS under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988); however, an appellant's arguments concerning consistency with a biological opinion would normally be subject to review.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

ENVIRONMENTAL POLICY ACT

(See also National Environmental Policy Act of 1969)

The mere fact that a proposed action is consistent with an approved Recreation Area Management Plan does not establish that no further environmental analysis is needed prior to implementing the proposal.

A proposal to regravels a 15-mile segment of a road which bisects two WSAs and provides access to an area of

ENVIRONMENTAL POLICY ACT--Continued

critical environmental concern is not subject to a categorical exclusion from the NEPA process as routine maintenance where the evidence establishes that the proposed action is not properly classified as "routine."

Oregon Natural Desert Ass'n, et al., 125 IBLA 52
(Jan. 5, 1993)

The general standard upon NEPA review of a BLM decision based on a FONSI for the proposed action is whether the record establishes that BLM took a "hard look" at the environmental consequences of the action; identified the relevant areas of environmental concern; made a reasonable finding that the impacts studied are insignificant; and, with respect to any potentially significant impacts, whether the record supports a finding that mitigating measures have reduced the potential impact to insignificance. Where the action is further modified by stipulations designed to mitigate responding to the analysis in the EA, the appeal will be reviewed on the whole record including the modifications.

As a general rule, a FONSI for a proposed action may not be predicated solely on monitoring environmental impacts because doubt as to the nature of the impacts ordinarily precludes a rational basis for a FONSI. Where the record discloses an analysis of the impacts of the proposed action and the imposition of stipulations designed to mitigate any potentially significant impacts, use of monitoring to determine the choice of alternate methods of mitigation does not itself compel reversal of a FONSI. However, a FONSI may be set aside and remanded where it appears from the record that the mitigating measures stipulated may be inadequate to mitigate potentially significant impacts.

Nat'l Wildlife Federation et al., 126 IBLA 48 (Apr. 14, 1993)

ENVIRONMENTAL POLICY ACT--Continued

A determination that approval of an APD to drill a natural gas well will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

Southern Utah Wilderness Alliance et al., 128 IBLA 52
(Dec. 2, 1993)

ENVIRONMENTAL QUALITY

(See also Water Pollution Control)

ENVIRONMENTAL STATEMENTS

The mere fact that a proposed action is consistent with an approved Recreation Area Management Plan does not establish that no further environmental analysis is needed prior to implementing the proposal.

A proposal to regravels a 15-mile segment of a road which bisects two WSAs and provides access to an area of critical environmental concern is not subject to a categorical exclusion from the NEPA process as routine maintenance where the evidence establishes that the proposed action is not properly classified as "routine."

Oregon Natural Desert Ass'n, et al., 125 IBLA 52
(Jan. 5, 1993)

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

A BLM decision to issue a right-of-way grant for an irrigation ditch and associated structures will be affirmed on appeal when based on a reasoned analysis of all relevant factors, including the threat to the human environment from potential breaches of the ditch and to the rights of downstream water users from the diversion of water, and provided the decision was made with due regard for the public interest and sufficient reasons for disturbing the decision have not been shown.

Daryl Richardson et al., 125 IBLA 132 (Jan. 15, 1993)

Where the record establishes that oil and gas leasing recommendations contained in an applicable land and RMP adopted by the FS were subject to revision upon site-specific examination and the FS, pursuant to such an examination, consents to leasing lands formerly designated as unavailable or as available for leasing with NSO restrictions, objections to a decision by BLM to issue leases in reliance on the FS recommendations will be rejected where the party objecting fails to show that the FS site-specific analysis was, in any way, flawed.

Colorado Environmental Coalition, 125 IBLA 210 (Feb. 5, 1993)

The general standard upon NEPA review of a BLM decision based on a FONSI for the proposed action is whether the record establishes that BLM took a "hard look" at the environmental consequences of the action; identified the relevant areas of environmental concern; made a reasonable finding that the impacts studied are insignificant; and, with respect to any potentially significant impacts, whether the record supports a finding that mitigating measures have reduced the potential impact to insignificance. Where the action is further modified by stipulations designed to mitigate responding to the analysis in the EA, the appeal will be

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

reviewed on the whole record including the modifications.

As a general rule, a FONSI for a proposed action may not be predicated solely on monitoring environmental impacts because doubt as to the nature of the impacts ordinarily precludes a rational basis for a FONSI. Where the record discloses an analysis of the impacts of the proposed action and the imposition of stipulations designed to mitigate any potentially significant impacts, use of monitoring to determine the choice of alternate methods of mitigation does not itself compel reversal of a FONSI. However, a FONSI may be set aside and remanded where it appears from the record that the mitigating measures stipulated may be inadequate to mitigate potentially significant impacts.

Nat'l Wildlife Federation et al., 126 IBLA 48 (Apr. 14, 1993)

Where BLM has prepared an EA and FONSI specific to a proposal to drill two exploratory geothermal observation/flow test wells and deepen an existing exploratory test well, and its analysis of possible full-field development is limited by the absence of any development proposal, that assessment is sufficient in scope and a site-specific EIS is not necessary.

Where review of the reasonably foreseeable impacts of geothermal test drilling failed to disclose a potentially significant impact and there was no evidence to the contrary, an EIS was not required.

Sierra Club, Inc., et al., 126 IBLA 142 (May 6, 1993)

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

A BLM decision to implement a management plan by closing part of a road on public lands in a recreation area to motor vehicle use in order to promote other recreational activities beyond the closure point will be affirmed where the decision was made after a reasoned analysis of all relevant factors, including the impact of closure on the human environment and alternatives to closure, and where the decision is supported by the record, and there has been no showing of compelling reasons for modification or reversal of the decision.

Larry Griffin, 126 IBLA 304 (June 15, 1993)

A decision approving a right-of-way for an oil and gas pipeline on public lands on the basis of an EA finding no significant impact which is tiered to a programmatic EIS for oil and gas leasing in the area will be affirmed where BLM has considered the cumulative impact of the right-of-way and the foreseeable oil and gas development to be served thereby and the record provides a reasonable basis for the conclusion that there will be no significant impacts other than those addressed in the EIS.

Southern Utah Wilderness Alliance, 127 IBLA 282 (Oct. 7, 1993)

A determination that approval of an application for a permit to drill an exploratory well and the grant of an associated right-of-way will not have a significant impact on the quality of the human environment will be affirmed on appeal where the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging a FONSI has the burden of establishing by a preponderance of the evidence that the finding was based on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

Southern Utah Wilderness Alliance et al., 127 IBLA 331
(Oct. 19, 1993) 100 I.D. 370

A determination that approval of an APD to drill a natural gas well will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

Southern Utah Wilderness Alliance et al., 128 IBLA 52
(Dec. 2, 1993)

EQUAL ACCESS TO JUSTICE ACT

CONTRACT DISPUTES ACT OF 1978

Allowable Expenses

In the exercise of the Board's discretion in determining the amount of an EAJA award, the degree of success obtained by a litigant is a critical factor. Tribunals have used various approaches when a litigant is not fully successful. Although not required, and not always appropriate, apportionment methods can be applied. One acceptable method is based upon the amount of time expended on the issue or issues upon which the

EQUAL ACCESS TO JUSTICE ACT--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Allowable Expenses--Continued

litigant prevailed. Another, when warranted, is based upon the degree of recovery compared to the total recovery sought. The Board found the 10-percent-based award for preremand efforts advocated by the applicant to be reasonable based upon both methods. Regarding remand efforts, although the applicant eschewed the apportionment approach, it had prevailed on only one of its two contentions. The Board found the record insufficient to make a comparative analysis of the time expended on remand and based the remand-related part of its EAJA award upon the applicant's 56-percent relative recovery.

The Board noted that a successful EAJA applicant is entitled to fees and expenses incurred in prosecuting its application and, once the Government fails to prove its position substantially justified on the underlying merits, there is no additional substantial justification defense to the EAJA application.

In reaching the amount of its EAJA award, the Board noted that the applicant had modified its application either to eliminate, to allocate correctly, or to support as proper, amounts contested by BOR. In the context of its proportionate recovery approach, the Board found the applicant's records to be sufficiently detailed. The applicant did not seek attorney fees in excess of EAJA's basic \$75-per-hour rate, although its actual rates were higher, and its claimed paralegal rates also were less than its normal billing rates. BOR did not object to claimed paralegal or law clerk rates. In allowing them, the Board found that the paralegal and law clerk expenses were reasonable and approximated the law firm's costs. On the applicant's claim for fees in connection with its EAJA application, the Board allowed fees supported by time sheets and disallowed those based upon counsel's unsupported estimate.

Application of White & McNeil Excavating, Inc., for Fees & Expenses under EAJA, IBCA-3108-F (Sept. 23, 1993)

100 I.D. 321

EQUAL ACCESS TO JUSTICE ACT--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Prevailing Party

In finding the applicant to be a prevailing party under EAJA, the Board noted that, under appropriate circumstances, a litigant may be a prevailing party for EAJA purposes even if it recovers as little as 10 percent of the total amount claimed, as with the applicant's appeal. BOR had alleged that the contractor was not a prevailing party because the issue upon which the contractor ultimately prevailed on remand--whether there had been any deduction from payment quantities on account of a defective riprap specification--had been raised by the Board. The Board found, however, that the contractor's success arose out of, and was linked to, its overall claims and documentation that the defective specification had caused it monetary damage.

Application of White & McNeil Excavating, Inc., for Fees & Expenses under EAJA, IBCA-3108-F (Sept. 23, 1993)
100 I.D. 321

Substantially Justified

In concluding that BOR had failed to establish a substantial justification defense under EAJA, the Board noted that BOR bore the burden of proof. Whether its position was substantially justified was to be determined based upon the administrative record as a whole. BOR had to prove substantial justification in the context of the litigation and its administrative actions. It failed to make the necessary proof that its position was justified to a degree that could satisfy a reasonable person, that is, justified in law and in fact.

Application of White & McNeil Excavating, Inc., for Fees & Expenses under EAJA, IBCA-3108-F (Sept. 23, 1993)
100 I.D. 321

EQUITABLE ADJUDICATION

GENERALLY

When a U.S. Court of Appeals has held that a claimant is entitled to equitable adjudication of his untimely application to purchase a trade and manufacturing site and the NPS has neither submitted any evidence contradicting the facts underpinning that holding nor demonstrated that the claimant's failure to timely comply with the law indicated bad faith, BLM properly considers the purchase application on the merits under the principles of equitable adjudication.

Although sec. 1870.33B of the BLM Manual requires BLM to contact the agency that has jurisdiction over the claimed land and request its concurrence in the allowance of an application, the refusal of the holding agency to concur in the allowance of the application does not preclude BLM from approving the application under its equitable adjudication authority.

A party appealing from a BLM decision has the burden of establishing error in the decision under appeal, and conclusory allegations of error, standing alone, do not discharge this burden.

Nat'l Park Service (Stuart G. Ramstad), 125 IBLA 335
(Mar. 29, 1993)

Where un rebutted evidence shows that BLM never advised a trespasser (in writing or orally) that a pending land exchange application would resolve all outstanding trespasses, and where it was clear both from a notice of realty action published in the Federal Register and from the issuance of patent that lands where an agricultural trespass was ongoing were not in fact covered by the exchange, BLM is not estopped from prosecuting either that agricultural trespass or the subsequent construction in trespass of a dam and pond on the same public lands. The trespasser, as the exchange applicant, properly bore the burden of bringing the

EQUITABLE ADJUDICATION--Continued

GENERALLY--Continued

question of the ownership of the lands covered by the agricultural trespass into the exchange negotiations.

Double J Land & Cattle Co., Peter A. Jaffe, 126 IBLA 101 (Apr. 21, 1993)

ESTOPPEL

Where un rebutted evidence shows that BLM never advised a trespasser (in writing or orally) that a pending land exchange application would resolve all outstanding trespasses, and where it was clear both from a notice of realty action published in the Federal Register and from the issuance of patent that lands where an agricultural trespass was ongoing were not in fact covered by the exchange, BLM is not estopped from prosecuting either that agricultural trespass or the subsequent construction in trespass of a dam and pond on the same public lands. The trespasser, as the exchange applicant, properly bore the burden of bringing the question of the ownership of the lands covered by the agricultural trespass into the exchange negotiations.

Double J Land & Cattle Co., Peter A. Jaffe, 126 IBLA 101 (Apr. 21, 1993)

One element for invoking estoppel is that the person asserting it must be ignorant of the true facts. Where appellant had constructive knowledge of regulation 30 CFR 701.5 and the conditions under which the Virginia program obtained primacy, which included the requirement to conform to 30 CFR 701.5, and where appellant had actual knowledge that OSM would require reclamation in accordance with applicable program

ESTOPPEL--Continued

standards, appellant cannot be said to be ignorant of the true facts.

Silica Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 191 (May 13, 1993)

In order to estop the Government, the party seeking estoppel must show, at least, that the traditional elements of estoppel are present. Thus, the party seeking estoppel must show that: (1) the party to be estopped knew the facts; (2) he intended that his conduct should be acted on or so acted that the party asserting the estoppel had a right to believe it was so intended; (3) the latter was ignorant of the true facts; and (4) he relied on the former's conduct to his injury.

Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 169 (Aug. 31, 1993)

Circumstances may exist where the Government can be estopped because a private party, acting in reliance upon Governmental conduct, was prevented from obtaining a right which might have been otherwise obtained. However, the Government can never be estopped if the effect of invoking estoppel would grant a right which was not available in the first instance.

Edgar Sebastian Roberts, 127 IBLA 217 (Sept. 21, 1993)

The Board will apply the doctrine of estoppel in reversing a 1991 decision of BLM declaring mining claims situated in the Death Valley National Monument abandoned and void for failure to file a notice of intent to hold the claims in 1979, where confusion existed regarding recordation and filing requirements under the Mining in the Parks Act and FLPMA and the claimants inquired of BLM in 1979 whether they were required to make additional filings for their claims during 1979, and in response BLM not only provided inaccurate information

ESTOPPEL--Continued

about the proper place of filing but also concealed a material fact from claimants.

Carl Dresselhaus et al., 128 IBLA 26 (Nov. 16, 1993)

EVIDENCE

GENERALLY

Evidence that valuable mineral had been successfully produced from the claims is not sufficient to establish a discovery without additional evidence that material of a similar grade remains on the claims. Without a showing that additional mineral material of a similar quality remains on the claims, the logical conclusion is that the mined material was an isolated showing.

Standing alone, the Government's reason for conducting a mineral examination or initiating a contest is not sufficient to establish error in a finding that a mining claim is not supported by a discovery. Without a showing that evidence was deliberately or inadvertently skewed to support a finding that the claims were invalid, it cannot be said that the mineral examiner's motivation has affected the evidence or the presentation at the hearing, or that the Government's motivation ultimately affected the ALJ's conclusion that the claims were not supported by a valuable mineral deposit.

When presenting evidence to overcome a Government's prima facie case that the claim is not supported by a discovery the claimants are not limited to rebutting the evidence submitted by the mineral examiners, and may present evidence of the location of the claims and the location of mineralization at any place on the claims, including places not examined or sampled by the mineral examiners.

United States v. Estate of Melvin E. Viles, Mary S. Viles, 126 IBLA 162 (May 10, 1993)

EVIDENCE--Continued

GENERALLY--Continued

When a royalty payor alleged that a request for a refund under sec. 10 of the OCSLA, 43 U.S.C. § 1339 (1988), was timely filed with the proper MMS office, but failed to corroborate timely receipt by MMS of the request by other evidence, MMS properly found that the agency's datestamp on the refund request proved that it was late.

Chevron U.S.A. Inc., 127 IBLA 96 (July 27, 1993)

BURDEN OF PROOF

When considering what evidentiary burden should be placed upon BLM in an appeal from a rejection of a prospecting permit application, it is proper to weigh the cost of that burden against the nature of the appellant's interest and the risk that an appellant would be improperly deprived of that interest if the greater burden were not placed on BLM. A prospecting permit applicant holds an expectancy and not an interest in the land and BLM is not required to sustain its workability determinations with the same quantum of evidence needed to sustain a discovery determination under the 1872 Mining Law.

Vanderbilt Gold Corp., 126 IBLA 72 (Apr. 19, 1993)

CREDIBILITY OF WITNESSES

An appraiser's interest in a case is a proper subject for cross-examination, however, a claim of bias on the part of an appraiser must be based on personal interest rather than employment.

Richard Connie Nielson v. The Bureau of Land Management, 125 IBLA 353 (Mar. 30, 1993)

EVIDENCE--Continued

HEARSAY

Hearsay evidence is admissible in an administrative proceeding reviewing issuance by OSM of a CO for exceeding the acreage limitations of a 2-acre permit, if it is relevant and material, and may constitute "substantial evidence" within the meaning of 5 U.S.C. § 706(2)(E) (1988), if it is reliable and probative. However, where such evidence is the sole basis for issuance of the CO, a multifactor analysis is used to assure its reliability, and when such evidence fails to withstand such analysis, the CO cannot be sustained.

Ron Deaton/Barwick Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 320 (June 16, 1993)

PAROL

Despite the parol evidence rule, and prior to contract interpretation, extrinsic evidence was admissible to establish that the settlement agreement was, or was not, completely integrated. The Board found appellant's several affidavits and declaration, which BIA did not controvert successfully, persuasive that the agreement was complete and final.

Appeal of Busby School Board of the Northern Cheyenne Tribe, IBCA-3007 (Aug. 25, 1993) 100 I.D. 301

PREPONDERANCE

In a Government contest of an Alaska Native allotment application, the contestant bears the burden of presenting sufficient evidence to establish a prima facie case of ineligibility and the Native applicant

EVIDENCE--Continued

PREPONDERANCE--Continued

bears the burden of proof by a preponderance of the evidence should a prima facie case be established. While a limited field examination presenting no significant evidence will not support a prima facie case, the applicant's statements, which if un rebutted would contradict the applicant's use of the allotment lands, may constitute a prima facie case.

The ultimate burden of proof in an Alaska Native allotment application is on the applicant to establish compliance with the use and occupancy requirements of the Native Allotment Act. Where the evidence has been reviewed and the allotment approved, an appellant before the Board is to show by a preponderance of the evidence that the challenged decision is in error. Thus, the parties in an appeal from a decision approving a Native allotment application must seek to establish their respective positions at some point by a preponderance of the evidence, which means that there must be a showing that something is more likely than not.

United States v. The Heirs of David F. Berry, 127 IBLA 196 (Sept. 14, 1993)

PRESUMPTIONS

While the legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence that the document was received by them, the presumption is not rebutted by the assertion that the document in question was mailed to the appropriate office and an appellant submits no evidence that it was actually received in that office.

Robert L. Mendenhall et al., 127 IBLA 73 (July 20, 1993)

EVIDENCE--Continued

PRIMA FACIE CASE

In a Government contest of an Alaska Native allotment application, the contestant bears the burden of presenting sufficient evidence to establish a prima facie case of ineligibility and the Native applicant bears the burden of proof by a preponderance of the evidence should a prima facie case be established. While a limited field examination presenting no significant evidence will not support a prima facie case, the applicant's statements, which if unrebutted would contradict the applicant's use of the allotment lands, may constitute a prima facie case.

United States v. The Heirs of David F. Berry, 127 IBLA 196 (Sept. 14, 1993)

SUFFICIENCY

BLM may properly cancel private maintenance and care agreements for wild horses and repossess the horses when there is sufficient evidence of improper care of the adopted animals to establish that the adopter violated the terms of the agreement.

Freddie R. Mason, 126 IBLA 28 (Apr. 13, 1993)

Evidence that valuable mineral had been successfully produced from the claims is not sufficient to establish a discovery without additional evidence that material of a similar grade remains on the claims. Without a showing that additional mineral material of a similar quality remains on the claims, the logical conclusion is that the mined material was an isolated showing.

Standing alone, the Government's reason for conducting a mineral examination or initiating a contest is not sufficient to establish error in a finding that a mining claim is not supported by a discovery. Without a showing that evidence was deliberately or inadvertently

EVIDENCE--Continued

SUFFICIENCY--Continued

skewed to support a finding that the claims were invalid, it cannot be said that the mineral examiner's motivation has affected the evidence or the presentation at the hearing, or that the Government's motivation ultimately affected the ALJ's conclusion that the claims were not supported by a valuable mineral deposit.

When presenting evidence to overcome a Government's prima facie case that the claim is not supported by a discovery the claimants are not limited to rebutting the evidence submitted by the mineral examiners, and may present evidence of the location of the claims and the location of mineralization at any place on the claims, including places not examined or sampled by the mineral examiners.

United States v. Estate of Melvin E. Viles, Mary S. Viles, 126 IBLA 162 (May 10, 1993)

WEIGHT

An appraiser's training and experience are properly considered in determining the weight to be given testimony. When an appraisal lacks an analysis showing why a specific value was selected from a range of values, the ALJ who presides at a hearing is in the best position to decide the weight to be accorded the appraiser's testimony.

Richard Connie Nielson v. The Bureau of Land Management, 125 IBLA 353 (Mar. 30, 1993)

EXCHANGES OF LAND

(See also Indians, Private Exchanges, State Exchanges, Wildlife Refuges & Projects)

GENERALLY

Where un rebutted evidence shows that BLM never advised a trespasser (in writing or orally) that a pending land exchange application would resolve all outstanding trespasses, and where it was clear both from a notice of realty action published in the Federal Register and from the issuance of patent that lands where an agricultural trespass was ongoing were not in fact covered by the exchange, BLM is not estopped from prosecuting either that agricultural trespass or the subsequent construction in trespass of a dam and pond on the same public lands. The trespasser, as the exchange applicant, properly bore the burden of bringing the question of the ownership of the lands covered by the agricultural trespass into the exchange negotiations.

Double J Land & Cattle Co., Peter A. Jaffe, 126 IBLA 101 (Apr. 21, 1993)

Regulations governing state land exchanges under sec. 8 of the Taylor Grazing Act required publication of notice in local newspapers providing an opportunity to protest the exchange application. Where the record discloses exchanges were not protested and were approved by a final decision, the doctrine of administrative finality precludes review of the propriety of the terms of the conveyances at the behest of a mining claimant who located claims on the lands more than 40 years later.

UOP, 127 IBLA 105 (Aug. 9, 1993)

EXCHANGES OF LAND--Continued

GENERALLY--Continued

A protest against an exchange of public for private land made pursuant to sec. 206 of FLPMA was properly denied when it was not established, as alleged, that the exchange would violate the Oregon and California Railroad and Reconveyed Coos Bay Grant Lands Act, statutory and regulatory requirements establishing minimum allowable value for exchange lands, or adversely affect local economies directly concerned with the exchange, or contravene the public interest. An allegation that a timber processor would be competitively disadvantaged by an exchange of a timbered tract to another timber company is found to be sufficient to establish standing to appeal from a denial of a protest against the proposed exchange but insufficient to establish that the exchange was not in the interest of the United States.

Swanson-Superior Forest Products, Inc., 127 IBLA 379
(Oct. 27, 1993)

A protest against an exchange of public and private land was properly denied when it was not shown that the proposal was contrary to valuation requirements imposed by FLPMA sec. 206 and applicable regulations, or that it violated operative land-use plans, or that the exchange was contrary to the public interest. The fact that the exchange resolved a trespass did not establish that it was contrary to public policy.

Brent Hansen et al., 128 IBLA 17 (Nov. 4, 1993)

FEDERAL EMPLOYEES AND OFFICERS

(See also Administrative Authority, Claims Against the United States, Officers & Employees)

GENERALLY

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976
(See also Hearings, Rights-of-Way)

CORRECTION OF CONVEYANCE DOCUMENTS

To show entitlement under 43 U.S.C. § 1746 (1988), to the extraordinary remedy of correction of a mineral patent, an applicant must show both that there was an error in fact that requires correction and that considerations of equity and justice favor such correction. A purchaser of a tax deed to a mineral patent failed to make a sufficient showing to warrant correction of the patent when the evidence offered to show error in the patent was inconclusive and he failed to show that equity favored granting his application.

Frank L. Lewis, 127 IBLA 307 (Oct. 7, 1993)

EXCHANGES

A protest against an exchange of public for private land made pursuant to sec. 206 of FLPMA was properly denied when it was not established, as alleged, that the exchange would violate the Oregon and California Railroad and Reconveyed Coos Bay Grant Lands Act, statutory and regulatory requirements establishing minimum allowable value for exchange lands, or adversely affect local economies directly concerned with the exchange, or contravene the public interest. An allegation that a timber processor would be competitively disadvantaged by an exchange of a timbered tract to another timber company is found to be sufficient to establish standing to appeal from a denial of a protest against the proposed exchange but insufficient to establish that the exchange was not in the interest of the United States.

Swanson-Superior Forest Products, Inc., 127 IBLA 379 (Oct. 27, 1993)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

EXCHANGES--Continued

A protest against an exchange of public and private land was properly denied when it was not shown that the proposal was contrary to valuation requirements imposed by FLPMA sec. 206 and applicable regulations, or that it violated operative land-use plans, or that the exchange was contrary to the public interest. The fact that the exchange resolved a trespass did not establish that it was contrary to public policy.

Brent Hansen et al., 128 IBLA 17 (Nov. 4, 1993)

GRAZING LEASES AND PERMITS

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

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FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

GRAZING LEASES AND PERMITS--Continued

§ 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

HEARINGS

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

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Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

HEARINGS--Continued

If the applicable statute does not expressly require a formal evidentiary hearing "on the record" and no contrary Congressional intent is evident, formal proceedings before an ALJ are not mandated. The language of 43 U.S.C. § 1732(c) (1988), allowing for revocation or suspension of a special recreation use permit after "notice and hearing," does not dictate a formal hearing before an ALJ, and a special recreation permittee's hearing rights under 43 U.S.C. § 1732(c) (1988), are satisfied when the permittee is given notice of BLM's adverse decision and afforded the right to appeal to the Interior Board of Land Appeals.

Dvorak Expeditions et al., 127 IBLA 145 (Aug. 25, 1993)

LAND-USE PLANNING

A decision to redraw the boundary of a grazing allotment to inhibit the transmission of disease from cattle to bighorn sheep will be affirmed if the decision rests upon a rational basis, reflects consideration of all relevant factors, is supported by the record, and the appellant fails to show the decision was improper.

Jerry W. Blair, Howard P. Blair v. Bureau of Land Management, 126 IBLA 296 (June 14, 1993)

A BLM decision to implement a management plan by closing part of a road on public lands in a recreation area to motor vehicle use in order to promote other recreational activities beyond the closure point will be affirmed where the decision was made after a reasoned analysis of all relevant factors, including the impact of closure on the human environment and alternatives to closure, and where the decision is supported by the

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

LAND-USE PLANNING--Continued

record, and there has been no showing of compelling reasons for modification or reversal of the decision.

Larry Griffin, 126 IBLA 304 (June 15, 1993)

PERMITS

BLM has the discretionary authority under 43 U.S.C. § 1732(b) (1988), and 43 CFR Subpart 8372 to issue special recreation use permits for commercial float boating operations and to set permit conditions. There must be a compelling reason for modification or reversal of an exercise of this discretionary authority, and the Board will affirm a decision exercising this authority if the decision is not arbitrary, capricious, or an abuse of discretion.

BLM may limit commercial jet back service during the peak summer use period to protect public safety. The fact that BLM was contemplating revisions to the recreation management plan concerning commercial jet back services when the restrictions were imposed did not render the imposition arbitrary, capricious, or an abuse of discretion.

The Exodus Corp., 126 IBLA 1 (Apr. 1, 1993)

Issuance of a special recreation permit for off-road vehicle tours over existing roads and trails may be affirmed on appeal where the record establishes that the potential impacts were carefully considered and protective stipulations and mitigating measures were applied to avoid significant adverse environmental impacts.

Eastern Sierra Audubon Society, 126 IBLA 222 (May 21, 1993)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

PERMITS--Continued

Issuance of a special recreation permit is discretionary, and BLM properly rejects an application for a permit for an organized off-road motorcycle event when there is evidence that the event could result in significant impacts to sensitive wildlife species and would be inconsistent with the management objectives, responsibilities, or programs for the public lands involved.

Checker Motorcycle Club, 126 IBLA 251 (June 1, 1993)

If the applicable statute does not expressly require a formal evidentiary hearing "on the record" and no contrary Congressional intent is evident, formal proceedings before an ALJ are not mandated. The language of 43 U.S.C. § 1732(c) (1988), allowing for revocation or suspension of a special recreation use permit after "notice and hearing," does not dictate a formal hearing before an ALJ, and a special recreation permittee's hearing rights under 43 U.S.C. § 1732(c) (1988), are satisfied when the permittee is given notice of BLM's adverse decision and afforded the right to appeal to the Interior Board of Land Appeals.

Dvorak Expeditions et al., 127 IBLA 145 (Aug. 25, 1993)

PLAN OF OPERATIONS

The raising of buffalo on the surface of an unpatented mining claim is barred where the record establishes that raising buffalo is not reasonably incidental to the mining operation.

United States v. Lee Jesse Peterson, 125 IBLA 72 (Jan. 6, 1993)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

PLAN OF OPERATIONS--Continued

In order to qualify under the "grandfathered uses" exception to the non-impairment standard applicable to lands within WSAs, the use in question must have been in existence either on Oct. 21, 1976, or temporarily suspended on that date, and must have continued thereafter following the logical pace and progression of development.

Southern Utah Wilderness Alliance et al., 125 IBLA 175
(Feb. 5, 1993) 100 I.D. 14

BLM properly required the operator of a placer mining claim to conform suction dredging operations in a river designated for potential addition to the national wild and scenic rivers system and related occupancy to a modified plan of operations because such operations do not constitute casual use under 43 CFR 3809.0-5 (1991).

Pierre J. Ott, 125 IBLA 250 (Feb. 11, 1993)

PUBLIC PARTICIPATION

Where BLM fails to accommodate a third party's desire to participate in its decisionmaking process concerning ADC, and where BLM issues on Feb. 25, 1993, a decision authorizing ADC commencing on Oct. 1, 1992, BLM's decision may be properly set aside and remanded to allow third parties to participate to ensure that BLM's ADC decisions predate the authorized ADC activity.

Predator Project, 127 IBLA 50 (July 20, 1993)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE
OF INTENTION TO HOLD MINING CLAIM

The Board will apply the doctrine of estoppel in reversing a 1991 decision of BLM declaring mining claims situated in the Death Valley National Monument abandoned and void for failure to file a notice of intent to hold the claims in 1979, where confusion existed regarding recordation and filing requirements under the Mining in the Parks Act and FLPMA and the claimants inquired of BLM in 1979 whether they were required to make additional filings for their claims during 1979, and in response BLM not only provided inaccurate information about the proper place of filing but also concealed a material fact from claimants.

Carl Dresselhaus et al., 128 IBLA 26 (Nov. 16, 1993)

In accordance with 43 CFR 3833.1-3, annual filings for mining claims must be accompanied by a nonrefundable service charge of \$5.00 for each claim. Annual filings received by BLM on or after Jan. 1, 1991, which are not accompanied by the proper service charges are, according to 43 CFR 3833.1-4(b), not to be accepted and are to be returned to the claimant/owner without further action. Thus, there can be no timely annual filing without the accompanying service charge and if the filing deadline passes without proper payment, the claims may be properly declared abandoned and void.

Where a mining claimant makes a timely filing of a notice of intention to hold during the filing year, but the check accompanying the notice, tendered in payment of the service charges, is correctly returned, after the filing deadline, as uncollectible by the bank upon which it is drawn, subsequent payment of the service fee could not cure what had become, because of the dishonored check, an untimely filing, and the claims are properly declared abandoned and void.

N.T.M., Inc., 128 IBLA 77 (Dec. 7, 1993)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIM CERTIFICATES OR
NOTICES OF LOCATION

Upon the failure of a mining claimant to appeal from a decision cancelling recordation of a mining claim under sec. 314 of FLPMA, 43 U.S.C. § 1744 (1988), all rights under the location are conclusively deemed to be abandoned and void.

In light of the adoption of sec. 314(b) of FLPMA, 43 U.S.C. § 1744(b) (1988), the provisions of 30 U.S.C. § 38 (1988), may not be used to establish rights under the mining laws of the U.S. for claims which have not been duly recorded with BLM under sec. 314(b).

While the legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence that the document was received by them, the presumption is not rebutted by the assertion that the document in question was mailed to the appropriate office and an appellant submits no evidence that it was actually received in that office.

Robert L. Mendenhall et al., 127 IBLA 73 (July 20, 1993)

Placer mining claimants who rely on the provisions of 30 U.S.C. § 38 (1988), to prove location and posting of a mining claim at a time when the land embraced by the location was open to location must comply with the recordation requirements of sec. 314 of FLPMA, 43 U.S.C. § 1744 (1988). Where such a claim has not been recorded, it is a nullity.

Gary Hoefler et al., 127 IBLA 211 (Sept. 14, 1993)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY

A BLM decision to issue a right-of-way grant for an irrigation ditch and associated structures will be affirmed on appeal when based on a reasoned analysis of all relevant factors, including the threat to the human environment from potential breaches of the ditch and to the rights of downstream water users from the diversion of water, and provided the decision was made with due regard for the public interest and sufficient reasons for disturbing the decision have not been shown.

Daryl Richardson et al., 125 IBLA 132 (Jan. 15, 1993)

BLM is entitled (and required) to charge fair market rental for an existing water pipeline right-of-way issued pursuant to Title V of FLPMA, as amended, 43 U.S.C. §§ 1761-1771 (1988), even though no rental had been charged for a right-of-way or use authorization for the pipeline for a number of years prior to right-of-way issuance.

It does not matter that no surface uses of the land subject to an existing water pipeline right-of-way are or may be disrupted by the pipeline. The rental is charged for the right to use the land, and would accrue even if the right-of-way holder did not use the land.

The fair market value rental for a linear right-of-way is based upon the amount of land required to construct and maintain the pipeline. The mere fact that the pipeline is longer than it might be if the sole basis for choosing the route had been the per-acre rental charge is not a proper basis for concluding that the rental is too high.

The regulation at 43 CFR 2803.1-2 provides authority for reduction or waiver of rental for a right-of-way if requiring payment of the full rental will cause undue hardship on the holder and it is in the public interest to reduce or waive the rental. BLM need not consider applying this regulation when assessing the

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

rental amount if there is no evidence that charging the full rental amount would cause undue hardship.

Jacqueline Balander, 125 IBLA 262 (Feb. 17, 1993)

Denial of an application for a right-of-way on the grounds that the right-of-way would destroy plants of a Category 1 candidate species under the Endangered Species Act and its habitat will be affirmed when the decision is based on a reasoned analysis of the factors involved, made in due regard for the public interest, and no significant reason is shown to disturb the decision. A showing that there is a possible difference of scientific opinion on the issue of whether the candidate species is properly regarded as a subspecies is not sufficient to disturb BLM's decision.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

When the right-of-way grant specifically provided for periodic rental adjustments to bring the right-of-way rental in line with fair market rental values it is proper for BLM to increase the annual rental to conform the rental amount to the current fair market rental value of the right-of-way.

When the holder of a right-of-way is a nonprofit municipal utility or cooperative, BLM may consider whether the holder is entitled to a reduction of rental pursuant to 43 CFR 2803.1-2(b)(2)(i) or (ii).

Valley Pioneers Water Co., Inc., 125 IBLA 326 (Mar. 25, 1993)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

A BLM increase in the rental charge for a communication site right-of-way is properly affirmed where the holder of the right-of-way fails to establish that the appraisal upon which the increase is based incorrectly determined the fair market rental value of the right-of-way. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of the right-of-way rental or the appellant demonstrates that the resulting charges are excessive. Absent a showing of error in the appraisal methods, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Quality Broadcasting Corp., Unicom Broadcasting, Inc.,
126 IBLA 174 (May 11, 1993)

Use of a road on Oregon and California lands for hauling logs before a permit is issued is a willful trespass under 43 CFR 2800.0-5(v).

Larry D. Olson, 126 IBLA 229 (May 24, 1993)

43 U.S.C. § 1766 (1988), and 43 CFR 2803.4(d) require written notice that cancellation of a right-of-way is contemplated for failure to comply with a condition of its granting and a reasonable opportunity to cure the noncompliance. A BLM decision cancelling a right-of-way without providing notice and a reasonable time to comply will be vacated.

John & Katherine Caton, 126 IBLA 335 (June 17, 1993)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

Under 43 CFR 2802.4(a), a right-of-way application to use public lands may be denied if BLM determines, among other things, that (1) the proposed right-of-way would be inconsistent with the purposes for which the public lands are managed, or (2) the proposed right-of-way would not be in the public interest. An application for an amendment of an existing right-of-way that seeks authorization for use of a substantial new parcel of public lands is properly reviewed in light of that regulation. BLM's decision rejecting the right-of-way application is properly affirmed where the case record amply supports its conclusion that the amendment would be inconsistent with BLM's management plan for the area and would not be in the public interest, as it would permanently destroy riparian lands and decrease habitat for the bald eagle, and would likely increase erosion.

The burden is on appellant, as the party challenging BLM's decision denying an application for amendment of a right-of-way, both to show adequate reason for appeal and, as appropriate, to support its allegations with evidence showing error. Conclusory allegations of error or differences of opinion, standing alone, do not suffice. The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. Where BLM has extensively researched the question of potential damage to riparian lands and concluded that they would be permanently harmed by proposed action, it is not enough that appellant offers a contrary opinion, but it must demonstrate by a preponderance of the evidence that BLM erred when collecting underlying data or in reaching its conclusion. BLM's decision is properly affirmed where appellant fails to do so.

King's Meadow Ranches, 126 IBLA 339 (June 17, 1993)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

A BLM increase in the annual rental charge for a communications site right-of-way will be vacated where the record fails to demonstrate any relationship between the right-of-way subject to appraisal and a BLM master appraisal determining the market value of a "typical" BLM right-of-way, and where there is no indication that the communications site at issue matched the comparable factors in BLM's appraisal for a "typical" right-of-way.

Confidential Communications Co., 126 IBLA 349 (June 25, 1993)

Where an existing FLPMA access road right-of-way grant provided that it was subject to the regulations in 43 CFR Part 2800, BLM properly established the rental for use thereof by utilizing the regulatory rental fee schedule for linear rights-of-way found at 43 CFR 2803.1-2(c) during the course of a periodic adjustment necessary to reflect the current fair market rental value. While the relevant statute and regulations provide for waiver or a reduction in the rental amount under certain circumstances, the right-of-way holder must prove eligibility for such consideration.

Ruth Tausta-White, 127 IBLA 101 (July 29, 1993)

An increase in the annual rental charge for a communications site right-of-way will be set aside if the record fails to demonstrate any relationship between the right-of-way subject to appraisal and a BLM master appraisal determining the market value of a "typical" BLM right-of-way, and there is no indication that the comparable factors at the communications site at issue matched the comparable factors considered in BLM's appraisal of a "typical" right-of-way.

Western Tele-Communications, Inc., 127 IBLA 313 (Oct. 12, 1993)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

The provisions of sec. 1323(b) of ANILCA, 16 U.S.C. § 3210(b) (1988), do not apply with respect to access to a Federal oil and gas lease since the leasehold estate does not constitute "nonfederally owned land" within the meaning of the statute.

Southern Utah Wilderness Alliance et al., 127 IBLA 331
(Oct. 19, 1993) 100 I.D. 370

Use of public lands for the purpose of a National Guard Maneuver Area is not properly authorized pursuant to the grant of a right-of-way under sec. 501 of FLPMA, 43 U.S.C. § 1761 (1988).

State of Alaska, Division of State Lands, 127 IBLA 375
(Oct. 21, 1993)

An application for a right-of-way for transportation of water across a WSA was properly rejected by BLM because it was inconsistent with purposes for which the land was managed. A right-of-way for water facilities was not shown to have existed prior to initiation of wilderness review by title documents that made no reference to facilities to transport water, nor did traces of an old pipeline at the proposed right-of-way location tend to show the existence of a continuing right-of-way for such facilities.

Roger G. Gervais, Patsy V. Gervais, 128 IBLA 43 (Dec. 1, 1993)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

The Federal grant for a pipeline right-of-way requires BLM to comply with sec. 106 of the National Historic Preservation Act, 16 U.S.C. § 470f (1988), on both Federal and non-Federal lands involved in the project.

Central Valley Electric Cooperative, Inc., 128 IBLA 126
(Dec. 22, 1993)

SURFACE MANAGEMENT

Occupancy of an unpatented mining claim is properly regulated to bar any unnecessary and undue degradation of the public lands as set forth in sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988). The accumulation of an excessive quantity of parts and materials stored in a disorganized manner on the surface of an unpatented mining claim causing a surface disturbance greater than would normally result when mining is performed by a prudent operator in usual, customary, and proficient operations of similar character gives rise to unnecessary and undue degradation of the public lands.

The raising of buffalo on the surface of an unpatented mining claim is barred where the record establishes that raising buffalo is not reasonably incidental to the mining operation.

United States v. Lee Jesse Peterson, 125 IBLA 72
(Jan. 6, 1993)

A determination by an authorized officer that dredging operations capable of moving over 2,400 yards of earth annually within the meaning of 43 CFR 3809.0-5 from the Merced River did not constitute "casual use"

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

SURFACE MANAGEMENT--Continued

was not overcome by an allegation that less than 5 acres of land would be disturbed by such activity.

A reclamation bond was properly required for operations conducted within a wild and scenic river study area pursuant to a plan of operations. 43 CFR 3809.1-9(b).

Lloyd L. Jones, 125 IBLA 94 (Jan. 8, 1993)

BLM properly required the operator of a placer mining claim to conform suction dredging operations in a river designated for potential addition to the national wild and scenic rivers system and related occupancy to a modified plan of operations because such operations do not constitute casual use under 43 CFR 3809.0-5 (1991).

Pierre J. Ott, 125 IBLA 250 (Feb. 11, 1993)

A road constructed to provide motor vehicle access to a mining claim located in a WSA without first obtaining an approved plan of operations permitting such activity pursuant to provision of 43 CFR 3802.1-1(a) was properly required to be reclaimed.

Lloyd L. Jones, 127 IBLA 270 (Oct. 1, 1993)

WILDERNESS

In order to qualify under the "grandfathered uses" exception to the non-impairment standard applicable to lands within WSAs, the use in question must have been in existence either on Oct. 21, 1976, or temporarily suspended on that date, and must have continued thereafter

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

WILDERNESS--Continued

following the logical pace and progression of development.

Southern Utah Wilderness Alliance et al., 125 IBLA 175
(Feb. 5, 1993) 100 I.D. 14

When a mining claim is located partially within a WSA, the regulations in 43 CFR Part 3802 apply, and BLM may properly issue a notice of noncompliance requiring a mining claimant to remove unauthorized structures for a WSA, reclaim disturbed lands, and submit a plan of operations and reclamation bond.

Paul M. Shock, 126 IBLA 232 (May 27, 1993)

A road constructed to provide motor vehicle access to a mining claim located in a WSA without first obtaining an approved plan of operations permitting such activity pursuant to provision of 43 CFR 3802.1-1(a) was properly required to be reclaimed.

Lloyd L. Jones, 127 IBLA 270 (Oct. 1, 1993)

A determination that approval of an application for a permit to drill an exploratory well and the grant of an associated right-of-way will not have a significant impact on the quality of the human environment will be affirmed on appeal where the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging a FONSI has the burden of establishing by a preponderance of the evidence that the finding was based on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

WILDERNESS--Continued

provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

While the authorized officer was clearly possessed of the authority under sec. 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1988), to precondition approval of a unitization agreement involving a pre-FLPMA oil and gas lease upon acceptance of the application of the nonimpairment standard to lands within a WSA, where he failed to do so the Board will not retroactively impose this condition on leased lands within a WSA.

The Secretary of the Interior and those authorized to act on his behalf have the discretionary authority to suspend operations and production under any oil or gas lease for conservation purposes, including the prevention of environmental damage. Where the record indicates that an EA prepared for drilling operations on an oil and gas lease located within both a ESA and an area of critical environmental concern failed to consider this option in evaluating the proposal to drill, the decision approving drilling operations will be set aside and the case will be remanded to permit consideration of whether, under this discretionary authority, operations under the lease should be suspended.

Issuance of a Federal oil and gas lease carries with it neither an express nor implied right of access to the leasehold. Thus, where a pre-FLPMA lease is surrounded by lands within a WSA, there is no valid existing right, within the meaning of sec. 701(h) of FLPMA, to obtain access to the lease boundaries across Federal land and, in the absence of grandfathered uses, access may not be granted if it would violate the nonimpairment standard mandated by sec. 603(c), 43 U.S.C. § 1782(c) (1988).

Since no express or implied rights of access arise upon issuance of a Federal oil and gas lease, the approval of the committal of a pre-FLPMA lease to a unit plan subsequent to the adoption of sec. 603(c) of FLPMA does not alter the application of the nonimpairment standard

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

WILDERNESS--Continued

in determining whether access to the lease across other lands within the unit may be permitted.

Southern Utah Wilderness Alliance et al., 127 IBLA 331
(Oct. 19, 1993) 100 I.D. 370

An application for a right-of-way for transportation of water across a WSA was properly rejected by BLM because it was inconsistent with purposes for which the land was managed. A right-of-way for water facilities was not shown to have existed prior to initiation of wilderness review by title documents that made no reference to facilities to transport water, nor did traces of an old pipeline at the proposed right-of-way location tend to show the existence of a continuing right-of-way for such facilities.

Roger G. Gervais, Patsy V. Gervais, 128 IBLA 43 (Dec. 1, 1993)

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982

ROYALTIES

Acting under authority provided by sec. 103 of FOGPMA, MMS properly required production of sales contracts and exchange agreements needed to ascertain whether gross proceeds from sales of Federal crude oil exceeded the value reported by the Federal lessee from a transfer between affiliated corporations that was not an arms-length transaction.

Santa Fe Energy Products Co., 127 IBLA 265 (Sept. 28, 1993)

FEDERAL ONSHORE OIL AND GAS LEASING REFORM ACT

GENERALLY

Under the provisions of 43 CFR 3101.7-3, a third-party objecting to issuance of an oil and gas lease on land within the National Forest System, pursuant to the consent of the FS, has standing to appeal to the Interior Board of Land Appeals. However, to the extent that the third-party raises objections to the conformity of actions undertaken by the FS with respect to its own internal operating procedures or with laws solely applicable to the FS, the Board will not review such contentions where the FS has provided its own appeal system for the resolution of such issues.

Where the record establishes that oil and gas leasing recommendations contained in an applicable land and RMP adopted by the FS were subject to revision upon site-specific examination and the FS, pursuant to such an examination, consents to leasing lands formerly designated as unavailable or as available for leasing with NSO restrictions, objections to a decision by BLM to issue leases in reliance on the FS recommendations will be rejected where the party objecting fails to show that the FS site-specific analysis was, in any way, flawed.

Colorado Environmental Coalition, 125 IBLA 210 (Feb. 5, 1993)

FISH AND WILDLIFE SERVICE

OHA does not have authority to review the merits of biological opinions issued by the U.S. FWS under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988); however, an appellant's arguments concerning consistency with a biological opinion would normally be subject to review.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

GEOPHYSICAL EXPLORATION

GENERALLY

Where BLM has prepared an EA and FONSI specific to a proposal to drill two exploratory geothermal observation/flow test wells and deepen an existing exploratory test well, and its analysis of possible full-field development is limited by the absence of any development proposal, that assessment is sufficient in scope and a site-specific EIS is not necessary.

Where the FWS has already issued a formal consultation document on issuance of geothermal leases near a lake which harbors an endangered species of fish, and the FWS has continued to consult with BLM to help devise mitigating measures for geothermal lease issuance and exploratory drilling, BLM may correctly decline to request a second formal consultation for the geothermal test drilling.

Sierra Club, Inc., et al., 126 IBLA 142 (May 6, 1993)

GEOHERMAL LEASES

(See also Hearings, Mineral Leasing Act)

GENERALLY

Where BLM has prepared an EA and FONSI specific to a proposal to drill two exploratory geothermal observation/flow test wells and deepen an existing exploratory test well, and its analysis of possible full-field development is limited by the absence of any development proposal, that assessment is sufficient in scope and a site-specific EIS is not necessary.

Where the FWS has already issued a formal consultation document on issuance of geothermal leases near a lake which harbors an endangered species of fish, and the FWS has continued to consult with BLM to help devise mitigating measures for geothermal lease issuance and exploratory drilling, BLM may correctly decline to

GEOTHERMAL LEASES--Continued

GENERALLY--Continued

request a second formal consultation for the geothermal test drilling.

Sierra Club, Inc., et al., 126 IBLA 142 (May 6, 1993)

REINSTATEMENT

A late rental payment by a geothermal lessee was not entitled to the benefit of a grace period provided by 43 CFR 3244.2-2(b)(1) because the payment bore a private postal meter mark. Bankruptcy administration was not shown to justify the late payment under provision of 43 CFR 3244.2-2(b) because there was no showing that the late payment was caused by the bankruptcy or any other agency beyond the control of the geothermal lessee.

GRI Exploration Corp., 127 IBLA 389 (Oct. 27, 1993)

TERMINATION

A late rental payment by a geothermal lessee was not entitled to the benefit of a grace period provided by 43 CFR 3244.2-2(b)(1) because the payment bore a private postal meter mark. Bankruptcy administration was not shown to justify the late payment under provision of 43 CFR 3244.2-2(b) because there was no showing that the late payment was caused by the bankruptcy or any other agency beyond the control of the geothermal lessee.

GRI Exploration Corp., 127 IBLA 389 (Oct. 27, 1993)

GRAZING AND GRAZING LANDS

BLM properly rejected an application for use in a grazing allotment where all of such use had been granted to a grazer who had control of water base available and accessible for stock watering purposes and was used under a color of right, absent a determination under state law that the grazer did not have valid water rights.

Silvino Ortiz v. Bureau of Land Management, 126 IBLA 8 (Apr. 1, 1993)

Where BLM denies an application to change livestock use from cattle to cattle and sheep based on the potential conflict with desert bighorn sheep, that decision is correctly affirmed by an ALJ when the record shows a rational basis for BLM's decision and appellant has failed to show the decision was improper.

Joe Iriart v. Bureau of Land Management, Utah Wilderness Ass'n (Intervenor), 126 IBLA 111 (Apr. 27, 1993)

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative

GRAZING AND GRAZING LANDS--Continued

review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

GRAZING LEASES

(See also Taylor Grazing Act)

CANCELLATION OR REDUCTION

A decision to redraw the boundary of a grazing allotment to inhibit the transmission of disease from cattle to bighorn sheep will be affirmed if the decision rests upon a rational basis, reflects consideration of all relevant factors, is supported by the record, and the appellant fails to show the decision was improper.

Jerry W. Blair, Howard P. Blair v. Bureau of Land Management, 126 IBLA 296 (June 14, 1993)

GRAZING PERMITS AND LICENSES

(See also Appeals, Hearings, Taylor Grazing Act)

ADJUDICATION

BLM properly rejected an application for use in a grazing allotment where all of such use had been granted to a grazer who had control of water base available and accessible for stock watering purposes and was used under a color of right, absent a determination under

GRAZING PERMITS AND LICENSES--Continued

ADJUDICATION--Continued

state law that the grazier did not have valid water rights.

Silvino Ortiz v. Bureau of Land Management, 126 IBLA 8 (Apr. 1, 1993)

Where BLM denies an application to change livestock use from cattle to cattle and sheep based on the potential conflict with desert bighorn sheep, that decision is correctly affirmed by an ALJ when the record shows a rational basis for BLM's decision and appellant has failed to show the decision was improper.

Joe Iriart v. Bureau of Land Management, Utah Wilderness Ass'n (Intervenor), 126 IBLA 111 (Apr. 27, 1993)

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C.

GRAZING PERMITS AND LICENSES--Continued

ADJUDICATION--Continued

§ 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

ADMINISTRATIVE LAW JUDGE

The time limits for protesting a proposed decision under 43 CFR 4160.2 and for filing an appeal of a final decision under 43 CFR 4160.3 and 4160.4 are mandatory. If a proposed decision is not protested within 15 days after it is received, it becomes a final decision without further notice and is then subject to appeal for 30 days.

William J. Thoman v. Bureau of Land Management, 125 IBLA 100 (Jan. 8, 1993)

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued

GRAZING PERMITS AND LICENSES--Continued

ADMINISTRATIVE LAW JUDGE--Continued

by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

APPEALS

The time limits for protesting a proposed decision under 43 CFR 4160.2 and for filing an appeal of a final decision under 43 CFR 4160.3 and 4160.4 are mandatory. If a proposed decision is not protested within 15 days after it is received, it becomes a final decision without further notice and is then subject to appeal for 30 days.

William J. Thoman v. Bureau of Land Management, 125 IBLA 100 (Jan. 8, 1993)

Where BLM denies an application to change live-stock use from cattle to cattle and sheep based on the potential conflict with desert bighorn sheep, that decision is correctly affirmed by an ALJ when the record shows a rational basis for BLM's decision and appellant has failed to show the decision was improper.

Joe Iriart v. Bureau of Land Management, Utah Wilderness Ass'n (Intervenor), 126 IBLA 111 (Apr. 27, 1993)

GRAZING PERMITS AND LICENSES--Continued

APPEALS--Continued

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

BASE PROPERTY (WATER)

BLM properly rejected an application for use in a grazing allotment where all of such use had been granted to a grazer who had control of water base available and accessible for stock watering purposes and was used under a color of right, absent a determination under

GRAZING PERMITS AND LICENSES--Continued

BASE PROPERTY (WATER)--Continued

state law that the grazer did not have valid water rights.

Silvino Ortiz v. Bureau of Land Management, 126 IBLA 8 (Apr. 1, 1993)

CANCELLATION OR REDUCTION

A grazing permit does not create any right, title, interest, or estate in or to lands. The privileges granted by a permit are entitled to procedural protections, but continued ownership of the permit is dependent upon compliance with its terms and conditions.

Luther Wallace Klump v. Bureau of Land Management, 125 IBLA 170 (Feb. 5, 1993)

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C.

GRAZING PERMITS AND LICENSES--Continued

CANCELLATION OR REDUCTION--Continued

§ 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

HEARINGS

The time limits for protesting a proposed decision under 43 CFR 4160.2 and for filing an appeal of a final decision under 43 CFR 4160.3 and 4160.4 are mandatory. If a proposed decision is not protested within 15 days after it is received, it becomes a final decision without further notice and is then subject to appeal for 30 days.

William J. Thoman v. Bureau of Land Management, 125 IBLA 100 (Jan. 8, 1993)

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued

GRAZING PERMITS AND LICENSES--Continued

HEARINGS--Continued

by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

The hearing before an ALJ provided by 43 CFR 4.470 for grazing appeals is authorized by sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988). This hearing is deemed to be a hearing "on the record" as provided by 5 U.S.C. § 554(a) (1988). The standard of proof at such a hearing is a preponderance of the evidence.

Ralph & Beverly Eason v. Bureau of Land Management, 127 IBLA 259 (Sept. 28, 1993)

TRESPASS

The time limits for protesting a proposed decision under 43 CFR 4160.2 and for filing an appeal of a final decision under 43 CFR 4160.3 and 4160.4 are mandatory. If a proposed decision is not protested within 15 days after it is received, it becomes a final decision without further notice and is then subject to appeal for 30 days.

William J. Thoman v. Bureau of Land Management, 125 IBLA 100 (Jan. 8, 1993)

HEARINGS

(See also Administrative Procedure, Federal Land Policy & Management Act of 1976, Geothermal Leases, Grazing Permits & Licenses, Indian Probate, Mining Claims, Multiple Mineral Development Act, Rules of Practice, Surface Mining Control & Reclamation Act of 1977, Surface Resources Act, Water Pollution Control)

In referring a case for a hearing, the Board will normally identify the subject matter and one or more issues. Such instructions do not preclude an ALJ from receiving evidence on and considering all relevant matters. The fact the Board does not comment on or rule upon all aspects of a case when referring it for a hearing does not mean that they are accepted as correct or made the law of the case.

Richard Connie Nielson v. The Bureau of Land Management, 125 IBLA 353 (Mar. 30, 1993)

Although the Board has discretionary authority to order a hearing before an ALJ pursuant to 43 CFR 4.415, a hearing is necessary only when there is a material issue of fact requiring resolution through the introduction of testimony and other evidence.

Vanderbilt Gold Corp., 126 IBLA 72 (Apr. 19, 1993)

Although authorized under 43 CFR 4.415, a fact-finding hearing will be ordered only when the record before the Board presents conflicting issues of fact that cannot be resolved on the basis of that record. Where appellant fails to submit all available evidence to the Board, it is not possible to conclude that the evidence is irreconcilable, and the request for hearing is properly denied.

Pine Grove Farms, 126 IBLA 269 (June 3, 1993)

HEARINGS--Continued

The hearing before an ALJ provided by 43 CFR 4.470 for grazing appeals is authorized by sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988). This hearing is deemed to be a hearing "on the record" as provided by 5 U.S.C. § 554(a) (1988). The standard of proof at such a hearing is a preponderance of the evidence.

Ralph & Beverly Eason v. Bureau of Land Management,
127 IBLA 259 (Sept. 28, 1993)

INDIAN PROBATE

(See also Appeals, Bureau of Indian Affairs, Hearings,
Indians, Rules of Practice)

ADMINISTRATIVE LAW JUDGE

Authority

When a claim for "finder's fees" arises within the context of a probate proceeding, seeks recovery from the IIM account of an heir or devisee, and is based on a contract that requires Departmental approval but has not been approved, the ALJ is an "authorized representative" of the Secretary of the Interior within the meaning of 25 CFR 115.9 for the purpose of considering whether the contract should be approved.

Estate of John Charlie, 24 IBIA 253 (Oct. 20, 1993)

INDIAN PROBATE--Continued

APPEAL (See also PLEADING, RECONSIDERATION)

Generally

The burden of proving error in an initial Departmental Indian probate decision is on the party challenging the decision.

Estate of Charles Running Bird, 24 IBIA 136 (July 30, 1993)

Standing to Appeal

An Agency Superintendent has standing to seek reopening of an estate, the decision in which conflicts with the decision in another estate. A Superintendent also has standing to appeal from a decision of an ALJ which creates a conflict in the law by being contrary to a decision issued in another estate.

Estate of Walter A. Abraham, 24 IBIA 86 (July 8, 1993)

CHILDREN, ILLEGITIMATE (See also INHERITING)

Generally

Written acknowledgments of paternity, especially those signed at a time reasonably contemporaneous with the child's birth, are persuasive evidence of paternity and are generally to be given greater weight than the recollections of witnesses.

Estate of Charles Running Bird, 24 IBIA 136 (July 30, 1993)

INDIAN PROBATE--Continued

EVIDENCE

Weight_of Evidence

Written acknowledgments of paternity, especially those signed at a time reasonably contemporaneous with the child's birth, are persuasive evidence of paternity and are generally to be given greater weight than the recollections of witnesses.

Estate of Charles Running Bird, 24 IBIA 136 (July 30, 1993)

INHERITING (See also CHILDREN, ADOPTED; CHILDREN, ILLEGITIMATE; WILLS)

Generally

Under 25 U.S.C. § 348 (1988), those persons who may inherit trust property from a deceased Indian are determined in accordance with the appropriate state law. Whether a person may inherit is not affected by whether the property will remain in trust in the hands of the heir.

Estate of Walter A. Abraham, 24 IBIA 86 (July 8, 1993)

INVENTORY (See also MODIFICATION OF INVENTORY)

Property Erroneously Excluded or Included

Indian probate regulations of DOI establish a procedure by which property which was improperly included in an estate inventory may be eliminated from the inventory, even though probate proceedings have been concluded. 43 CFR 4.273.

Severo Leon et al. v. Albuquerque Area Director, Bureau of Indian Affairs, 23 IBIA 248 (Mar. 23, 1993)

INDIAN PROBATE--Continued

REHEARING (See also ADMINISTRATIVE PROCEDURE,
HEARING)

Generally

A person seeking reopening of an Indian estate closed for more than 3 years should set forth all of the issues he/she intends to raise in the petition for reopening.

Estate of Teresa Mitchell, 25 IBIA 88 (Dec. 17, 1993)

REOPENING

Generally

Petitions to reopen Indian probates closed for more than 3 years require compelling proof that the petitioner has acted with due diligence.

Estate of Little Snake (John Smith), 24 IBIA 121
(July 27, 1993)

Standing to Petition for Reopening

An Agency Superintendent has standing to seek reopening of an estate, the decision in which conflicts with the decision in another estate. A Superintendent also has standing to appeal from a decision of an ALJ which creates a conflict in the law by being contrary to a decision issued in another estate.

Estate of Walter A. Abraham, 24 IBIA 86 (July 8, 1993)

INDIAN PROBATE--Continued

REOPENING--Continued

Standing to Petition for Reopening--Continued

An adult who participated in the original probate hearing into a deceased Indian's estate lacks standing to petition for reopening.

Where a petition to reopen a closed Indian estate is based on a claimed interest which derives entirely from the petitioner's predecessor in interest, the petitioner has only the standing that his/her predecessor would have had.

Estate of Little Snake (John Smith), 24 IBIA 121 (July 27, 1993)

STATE LAW

Applicability to Indian Probate, Testate

Whether an Indian decedent has executed a will passing trust property is a question of Federal, not state, law.

Estate of Teresa Mitchell, 25 IBIA 88 (Dec. 17, 1993)

WILLS (See also CONTRACT TO MAKE WILL, INHERITING)

Execution

Whether an Indian decedent has executed a will passing trust property is a question of Federal, not state, law.

Estate of Teresa Mitchell, 25 IBIA 88 (Dec. 17, 1993)

INDIAN PROBATE--Continued

WITNESSES

Observation by Administrative Law Judge

Where evidence is conflicting, the Board of Indian Appeals normally will not disturb a decision based upon findings of credibility when the ALJ had an opportunity to hear the witnesses and to observe their demeanor.

Estate of Charles Running Bird, 24 IBIA 136 (July 30, 1993)

INDIANS

(See also Board of Indian Appeals, Bureau of Indian Affairs, Indian Probate)

GENERALLY

Regulations are interpreted in accordance with traditional principles of statutory construction. Words used in regulations are given their plain and ordinary meaning unless they are technical terms or terms of art, in which case they are given their technical meaning.

Okie Crude Co., et al. v. Muskogee Area Director, Bureau of Indian Affairs, 23 IBIA 174 (Feb. 5, 1993)

Self-executing legislation contains the standards necessary for its enforcement without the need for implementing regulations.

White Earth Band of Chippewa Indians v. Minneapolis Area Director, Bureau of Indian Affairs, 23 IBIA 216 (Mar. 3, 1993)

INDIANS--Continued

GENERALLY--Continued

In cases arising under 25 CFR 2.8, challenging the failure of a BIA official to issue a decision, the burden is on the Bureau either to show that the failure was justified or to present and support a position that the official could have taken.

United Auburn Indian Community v. Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 33 (May 28, 1993)

Courts commonly give deference to the construction of a statute by the agency charged with its administration, particularly one which was contemporaneous with the statute and has been consistently followed by the agency.

Hopi Tribe v. Director, Office of Trust Responsibilities, Bureau of Indian Affairs, 24 IBIA 65 (June 22, 1993)

Inclusion of a copy of 25 CFR Part 2 with a decision issued by a BIA Superintendent, although an excellent practice, does not replace the written statement of appeal rights that is required under 25 CFR 2.7(c).

Nevaco, Inc. & Pyramid Lake Paiute Tribe of Indians v. Acting Phoenix Area Director, Bureau of Indian Affairs, 24 IBIA 157 (Aug. 31, 1993)

In order to correct prior error, an official of the BIA may change an administrative interpretation of a statute as long as the reason for the change is clearly set forth to show that the departure from the prior administrative position is not arbitrary or capricious.

INDIANS--Continued

GENERALLY--Continued

In order to estop the Government, the party seeking estoppel must show, at least, that the traditional elements of estoppel are present. Thus, the party seeking estoppel must show that: (1) the party to be estopped knew the facts; (2) he intended that his conduct should be acted on or so acted that the party asserting the estoppel had a right to believe it was so intended; (3) the latter was ignorant of the true facts; and (4) he relied on the former's conduct to his injury.

Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 169 (Aug. 31, 1993)

The qui tam provision of 25 U.S.C. § 81 (1988), authorizes Federal courts to hear suits brought under that section by third parties in the name of the U.S. and, under appropriate circumstances, to order the recovery of money paid by or on behalf of an Indian tribe. The Board of Indian Appeals is not a Federal court, and the qui tam provision does not grant standing in an administrative proceeding before the Board.

Robert & Krista Johnson v. Acting Phoenix Area Director, Bureau of Indian Affairs, 25 IBIA 18 (Nov. 12, 1993)

ATTORNEYS

Fees

Courts commonly give deference to the construction of a statute by the agency charged with its administration, particularly one which was contemporaneous with the statute and has been consistently followed by the agency.

25 U.S.C. §§ 640d-7(e) and 640d-27(a) (1988), both mandate the payment of "appropriate" or "reasonable" litigation costs incurred by the Navajo Nation, the Hopi

INDIANS--Continued

ATTORNEYS--Continued

Fees--Continued

Tribe, and the San Juan Southern Paiute Tribe under the Navajo-Hopi Settlement Act, 25 U.S.C. §§ 640d-640d-28 (1988).

Hopi Tribe v. Director, Office of Trust Responsibilities, Bureau of Indian Affairs, 24 IBIA 65 (June 22, 1993)

CIVIL RIGHTS

Indian Civil Rights Act of 1968

The Indian Civil Rights Act, 25 U.S.C. § 1302 (1988), is not an independent grant of jurisdiction to DOI to scrutinize tribal actions when those actions do not otherwise require Departmental approval or other involvement.

Arthur J. Welmas & Linda Streeter Dukic, Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 264 (Oct. 20, 1993)

"Ex post facto law." The term "ex post facto law" in the Indian Civil Rights Act of 1968, 26 U.S.C. § 1302(9) (1988), should not be given a broader interpretation than the same term in the Constitution of the U.S., Art. I, sec. 9, cl. 3, and sec. 10, cl. 1.

Janie Jovita Flores et al. v. Acting Anadarko Area Director, Bureau of Indian Affairs, 25 IBIA 6 (Nov. 12, 1993)

INDIANS--Continued

CONTRACTS

Generally

In an appeal alleging an agreement with the contracting officer settling a dispute under contracts issued pursuant to the Indian Self-Determination and Education Assistance Act, which provides that the CDA shall apply, the contracting officer's proclaimed final decision denying Busby's properly certified claim imbued the Board with jurisdiction under the CDA to determine whether the claim had been settled.

Appeal of Busby School Board of the Northern Cheyenne Tribe, IBCA-3007 (Aug. 25, 1993) 100 I.D. 301

The starting point for understanding a contract is the language of the document.

Nevaco, Inc. & Pyramid Lake Paiute Tribe of Indians v. Acting Phoenix Area Director, Bureau of Indian Affairs, 24 IBIA 157 (Aug. 31, 1993)

The determination of the nature of an agreement relating to the use of Indian trust land is a question of Federal law. It is appropriate to apply state contract law to this determination only when there are no Federal cases on point, and then only so far as state law does not conflict with the Federal interest in protecting the use of Indian resources. The decisions of the Board of Indian Appeals are part of the Federal law relating to contracts involving the use of trust land.

Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 169 (Aug. 31, 1993)

INDIANS--Continued

CONTRACTS--Continued

Generally--Continued

When a claim for "finder's fees" arises within the context of a probate proceeding, seeks recovery from the IIM account of an heir or devisee, and is based on a contract that requires Departmental approval but has not been approved, the ALJ is an "authorized representative" of the Secretary of the Interior within the meaning of 25 CFR 115.9 for the purpose of considering whether the contract should be approved.

Estate of John Charlie, 24 IBIA 253 (Oct. 20, 1993)

A person doing business with an Indian tribe lacks standing to raise a violation of the requirements of 25 U.S.C. § 81 (1988).

Robert & Krista Johnson v. Acting Phoenix Area Director, Bureau of Indian Affairs, 25 IBIA 18 (Nov. 12, 1993)

When an oil and gas development agreement entered into under the Indian Mineral Development Act, 25 U.S.C. §§ 2101-2108 (1988), provides that it remains in effect after its initial term as long as oil and/or gas is produced in paying quantities, it expires by its own terms when production in paying quantities ceases.

Jay Magness v. Albuquerque Area Director, Bureau of Indian Affairs, 25 IBIA 65 (Dec. 6, 1993)

INDIANS--Continued

EDUCATION AND TRAINING

Vocational Training

BIA Manual provisions restricting second requests for adult vocational training services are without the force of law when sought to be applied against parties outside the Bureau.

Alfonso Robles v. Sacramento Area Director, Bureau of Indian Affairs, 23 IBIA 276 (Mar. 29, 1993)

ENROLLMENT/TRIBAL MEMBERSHIP

DOI generally lacks authority to review sanctions imposed by a tribe against a tribal member. Under limited circumstances set forth in 25 CFR 62.4(a)(3), the Department may review tribal disenrollment decisions. However, the Board of Indian Appeals declines to adopt a theory of "constructive disenrollment" in order to invoke sec. 62.4(a)(3), when the tribal governing documents authorize sanctions less than disenrollment under the disenrollment provisions.

Arthur J. Welmas & Linda Streeter Dukic, Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 264 (Oct. 20, 1993)

Respect for tribal self-government requires that tribal remedies be exhausted before a Federal forum may entertain a challenge to tribal actions or authority. This is particularly true where the matter at issue involves tribal membership.

Janie Jovita Flores et al. v. Acting Anadarko Area Director, Bureau of Indian Affairs, 25 IBIA 6 (Nov. 12, 1993)

INDIANS--Continued

FEDERAL RECOGNITION OF INDIAN TRIBES

Resumption of Trust Relationship

The DOI lacks authority to administratively restore recognition of an Indian tribe that was lawfully terminated pursuant to legislation.

United Auburn Indian Community v. Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 33 (May 28, 1993)

FINANCIAL MATTERS

Financial Assistance

In determining which applications will be funded, it is improper for the BIA to combine applications for funding under one grant program with applications under another grant program when the criteria and purposes of the two grant programs are different.

Three Affiliated Tribes of the Fort Berthold Reservation v. Aberdeen Area Director, Bureau of Indian Affairs, 23 IBIA 160 (Jan. 14, 1993)

BIA Manual provisions restricting second requests for adult vocational training services are without the force of law when sought to be applied against parties outside the Bureau.

Alfonso Robles v. Sacramento Area Director, Bureau of Indian Affairs, 23 IBIA 276 (Mar. 29, 1993)

INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

Where a Federal Register announcement of two grant programs under the Indian Self-Determination Act, 25 U.S.C. § 450h (1988), includes a particular provision in the criteria for one of the programs, and omits that provision from the criteria for the other program, the omission is significant to show that a different intent existed.

Although sec. 103 of the Indian Self-Determination Act, 25 U.S.C. § 450h (1988), contemplates that "tribal organizations" may receive planning grants, the BIA's discretionary authority under this section includes the authority to limit eligibility for planning grants to Indian tribes.

Ramah Navajo School Board, Inc. v. Albuquerque Area Director, Bureau of Indian Affairs, 24 IBIA 104 (July 13, 1993)

BIA regulations and guidelines concerning grant programs for Indian tribes are subject to the rule of construction that enactments intended to benefit Indians are to be liberally construed in their favor.

In administering competitive grant programs for Indian tribes, BIA has a duty to provide fair and equitable treatment to all applicants. This duty includes an obligation to ensure that the Bureau's Area Offices interpret the basic eligibility criteria for the programs in a consistent matter. It also includes an obligation to provide clear notice of the eligibility criteria to potential grant applicants.

Reno-Sparks Indian Colony v. Phoenix Area Director, Bureau of Indian Affairs, 24 IBIA 199 (Sept. 21, 1993)

INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

The BIA is not authorized, either by the regulations governing the Bureau's general assistance program or by the corresponding provisions of the BIA Manual, to require a non-Indian spouse of a grant recipient to submit job search reports. However, the Bureau may require the grant recipient to submit verified information concerning the spouse's employment situation.

Pat Hayes v. Anadarko Area Director, Bureau of Indian Affairs, 25 IBIA 50 (Nov. 30, 1993)

Individual Indian Money Accounts

Under 25 CFR 115.9(b) an individual must be informed that a hold has been placed on funds in his or her IIM account and given the right to request a hearing. However, the regulation further provides that, if the individual fails to request a hearing, he or she is deemed to consent to the limitation on and/or disbursement of funds from the account as set forth in the notice.

John Fredericks, Jr. v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 24 IBIA 115 (July 27, 1993)

When a claim for "finder's fees" arises within the context of a probate proceeding, seeks recovery from the IIM account of an heir or devisee, and is based on a contract that requires Departmental approval but has not been approved, the ALJ is an "authorized representative" of the Secretary of the Interior within the meaning of 25 CFR 115.9 for the purpose of considering whether the contract should be approved.

Estate of John Charlie, 24 IBIA 253 (Oct. 20, 1993)

INDIANS--Continued

GAMING

Self-executing legislation contains the standards necessary for its enforcement without the need for implementing regulations.

The Indian Gaming Regulatory Act, 25 U.S.C. § 2711(c), requires BIA to examine the capital investment structure against the income projections for the gaming activity in determining whether or not to approve a split of income between a tribe and a management company under which less than 70 percent of the net income would go to the tribe.

The Indian Gaming Regulatory Act, 25 U.S.C. § 2711(b), requires BIA to compare the capital investment required and the income projections for the gaming activity in determining whether or not to approve a gaming management contract with a term exceeding 5 years.

White Earth Band of Chippewa Indians v. Minneapolis Area Director, Bureau of Indian Affairs, 23 IBIA 216 (Mar. 3, 1993)

GRANTS

Jurisdiction

The Board has jurisdiction to decide disputes arising from grants made under the Tribally Controlled Schools Act of 1988, 25 U.S.C. §§ 2501-2511.

Appeal of Rough Rock Community School Board, IBCA-3037 (Feb. 12, 1993) 100 I.D. 45

INDIANS--Continued

GRANTS--Continued

Tribally Controlled Schools Act

Grant recipients under the Tribally Controlled Schools Act are not entitled to interest pursuant to the Prompt Payment Act on late payments, because the Prompt Payment Act by its terms applies only to contracts as such; and any payment of interest on the Tribally Controlled Schools Act grants would require express statutory authority, which clearly does not exist.

Appeal of Rough Rock Community School Board, IBCA-3037
(Feb. 12, 1993) 100 I.D. 45

HUNTING, FISHING, AND GATHERING RIGHTS

Generally

The Act of Mar. 14, 1940 requires BOR to further both irrigation and tribal fishing uses of the Bull Lake Reservoir. However, the 1940 Act also requires that inconsistencies between tribal uses and reservoir purposes must be resolved to permit fulfillment of the reservoir purposes.

Where there is no reserved water right for maintenance of pool elevations in Bull Lake Reservoir, the Shoshone and Arapohoe Tribes cannot require BOR to maintain a particular reservoir level.

Bureau of Reclamation Responsibilities in Operating Bull Lake Reservoir, M-36973 (Feb. 21, 1992) 100 I.D. 185

INDIANS--Continued

INDIAN REORGANIZATION ACT

Although required by statute, review of amendments to the IRA constitutions is an intrusion into tribal self-government. Review should therefore be undertaken in such a way as to avoid unnecessary interference with tribal self-government.

Cheyenne River Sioux Tribe v. Aberdeen Area Director, Bureau of Indian Affairs, 24 IBIA 55 (June 15, 1993)

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

Generally

Where an appeal procedure for certain decisions under the Indian Self-Determination Act appears only in the BIA Manual, and is not required either by statute or regulation, an appellant may waive the procedure in the Manual and proceed under the Bureau's general appeal regulations in 25 CFR Part 2.

Under 25 U.S.C. § 450j-1(b)(3) (1988), the BIA is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under the Indian Self-Determination Act.

Even in the case of a decision based on the exercise of discretionary authority, the BIA has a responsibility to explain the rationale and factual basis of the decision.

Kaw Nation v. Anadarko Area Director, Bureau of Indian Affairs, 24 IBIA 21 (May 26, 1993)

INDIANS--Continued

INDIAN SELF-DETERMINATION AND EDUCATION
ASSISTANCE ACT--Continued

Generally--Continued

Where a Federal Register announcement of two grant programs under the Indian Self-Determination Act, 25 U.S.C. § 450h (1988), includes a particular provision in the criteria for one of the programs, and omits that provision from the criteria for the other program, the omission is significant to show that a different intent existed.

Although sec. 103 of the Indian Self-Determination Act, 25 U.S.C. § 450h (1988), contemplates that "tribal organizations" may receive planning grants, the BIA's discretionary authority under this section includes the authority to limit eligibility for planning grants to Indian tribes.

Ramah Navajo School Board, Inc. v. Albuquerque Area Director, Bureau of Indian Affairs, 24 IBIA 104 (July 13, 1993)

JUDGMENT FUNDS

Use and distribution of funds awarded to an Indian tribe by the Indian Claims Commission or the U.S. Court of Federal Claims is governed by the provisions of the Indian Tribal Judgment Funds Use or Distribution Act, 25 U.S.C. §§ 1401-1408, which inter alia, requires the Secretary of the Interior to submit to Congress a plan for the use and distribution of the funds awarded.

Ottawa Indian Tribe of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 24 IBIA 92 (July 8, 1993)

INDIANS--Continued

LANDS

Generally

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to determine the validity of title to Indian land.

Severo Leon et al. v. Albuquerque Area Director, Bureau of Indian Affairs, 23 IBIA 248 (Mar. 23, 1993)

When surveying the boundaries of an Indian reservation created in 1891 on an island off the coast of Alaska, it was not proper to include an island in the reservation that clearly was not included as the reservation was defined by the President in 1916.

State of Alaska, Forest Service, U.S. Dept. of Agriculture, 127 IBLA 1 (July 12, 1993)

The determination of the nature of an agreement relating to the use of Indian trust land is a question of Federal law. It is appropriate to apply state contract law to this determination only when there are no Federal cases on point, and then only so far as state law does not conflict with the Federal interest in protecting the use of Indian resources. The decisions of the Board of Indian Appeals are part of the Federal law relating to contracts involving the use of trust land.

Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 169 (Aug. 31, 1993)

INDIANS--Continued

LANDS--Continued

Allotments

Right to Receive

BLM properly rejected an Indian allotment application filed in 1978 for land allegedly in the public domain that was included in a trust patent issued to another Indian in 1907.

Irene Mitchell Pallin, 126 IBLA 344 (June 22, 1993)

Allotments on Public Domain

Generally

BLM properly rejected an application under sec. 4 of the Indian General Allotment Act, as amended, 25 U.S.C. § 334 (1988), for an Indian allotment when the applicant failed to provide, either with her application or in response to a BLM decision requiring her to do so, a certificate of eligibility showing that she is or is entitled to be a recognized member of a Federally recognized Indian tribe.

Ramona L. Randa, 125 IBLA 153 (Jan. 21, 1993)

Lands Subject to

BLM properly rejected an Indian allotment application filed in 1978 for land allegedly in the public domain that was included in a trust patent issued to another Indian in 1907.

Irene Mitchell Pallin, 126 IBLA 344 (June 22, 1993)

INDIANS--Continued

LANDS--Continued

Individual Rights in Tribal Lands

An individual, even if a tribal member, does not acquire an ownership interest in tribal land by virtue of a tribal allocation of a right to occupy the land.

Janie Jovita Flores et al. v. Acting Anadarko Area Director, Bureau of Indian Affairs, 25 IBIA 6 (Nov. 12, 1993)

Individual Trust or Restricted Land

Generally

Under 25 U.S.C. § 380 (1988), and 25 CFR 162.2(a)(4), the BIA may grant leases of individually owned trust or restricted land when the heirs have not been able to agree upon a lease during a 3-month period, provided the land is not in use by any of the heirs.

Lower Peoples Creek Cooperative v. Acting Billings Area Director, Bureau of Indian Affairs, 23 IBIA 297 (Apr. 22, 1993)

Where a tribe has adopted a policy concerning "owner's use" of land in fractionated ownership, the provisions of 25 CFR 162.2(a)(4) must be read in conjunction with the tribal policy.

Vincent Blackhawk v. Billings Area Director, Bureau of Indian Affairs, 24 IBIA 275 (Oct. 21, 1993)

INDIANS--Continued

LANDS--Continued

Individual Trust or Restricted Land--Continued

Alienation

The Secretary of the Interior has the authority to approve a conveyance of Indian trust or restricted land after the death of the Indian grantor if the Secretary is satisfied that the consideration for the conveyance was adequate; the grantor received the consideration; and there was no fraud, overreaching, or other illegality in the procurement of the conveyance.

Decisions to approve or disapprove conveyances of Indian trust or restricted land are committed to the discretion of BIA. In reviewing such decisions, the Board does not substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

In retroactively approving a conveyance of Indian trust or restricted property, BIA need not find that the conveyance complied in every respect with the statutes and regulations in force at the time of the conveyance, but must be satisfied that the fundamental intent of the statutes and regulations has been fulfilled.

In determining whether a change in law or in the interpretation of law should be given retroactive effect, the Board of Indian Appeals will consider: (1) the nature of the reliance placed upon the prior applications of law by the parties; (2) the harm or prejudice to those who relied upon previous principles of law; (3) the purpose of the law in light of public policy; and (4) the harm to the administration of justice or public purpose.

Severo Leon et al. v. Albuquerque Area Director, Bureau of Indian Affairs, 23 IBIA 248 (Mar. 23, 1993)

INDIANS--Continued

LANDS--Continued

Individual Trust or Restricted Land--Continued

Alienation--Continued

In actions relating to the sale of an individual Indian's interest in trust property to another Indian or an Indian tribe, BIA's trust duty is to the Indian for whom the interest is held in trust, not the prospective purchaser or purchasers.

Kenneth Gullickson v. Aberdeen Area Director, Bureau of Indian Affairs, 24 IBIA 247 (Oct. 14, 1993)

Tribal Lands

BIA officials are not authorized to grant leases of tribal land.

Lower Peoples Creek Cooperative v. Acting Billings Area Director, Bureau of Indian Affairs, 23 IBIA 297 (Apr. 22, 1993)

In a matter concerning the use and/or distribution of funds generated from tribal lands, the BIA trust responsibility is to the tribe.

Arthur J. Welmas & Linda Streeter Dukic, Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 264 (Oct. 20, 1993)

INDIANS--Continued

LANDS--Continued

Tribal_Lands--Continued

Indian tribes have the power to restrict the assignment of tribal lands to tribal members.

Janie Jovita Flores et al. v. Acting Anadarko Area Director, Bureau of Indian Affairs, 25 IBIA 6 (Nov. 12, 1993)

In matters relating to the use of tribal property, the BIA's trust responsibility is to the tribe, not a person doing business with the tribe, even though that person may be Indian and a tribal member.

Robert & Krista Johnson v. Acting Phoenix Area Director, Bureau of Indian Affairs, 25 IBIA 18 (Nov. 12, 1993)

Trust Acquisitions

Under 25 CFR 151.3(b), land in unrestricted fee status may be acquired in trust for individual Indians only if it is located within the exterior boundaries of an Indian reservation or adjacent thereto.

While 25 U.S.C. § 465 (1988), vests broad discretion in the Secretary of the Interior to acquire land in trust for Indians, the Secretary has imposed limitations on his discretion by promulgating the regulations in 25 CFR Part 151.

"Adjacent." Where the term "adjacent" is used but not defined in the regulations governing trust acquisitions of land for Indians, the Board of Indian Appeals declines to impose an interpretation upon the BIA, but,

INDIANS--Continued

LANDS--Continued

Trust Acquisitions--Continued

instead refers to the Ass't Secretary--Indian Affairs an appeal in which the meaning of the term is at issue.

Virginia Cross v. Acting Portland Area Director, Bureau of Indian Affairs, 23 IBIA 149 (Jan. 11, 1993)

Trust Patent

BLM properly rejected an Indian allotment application filed in 1978 for land allegedly in the public domain that was included in a trust patent issued to another Indian in 1907.

Irene Mitchell Pallin, 126 IBLA 344 (June 22, 1993)

LEASES AND PERMITS

Generally

A lease issued under the IMLA, 25 U.S.C. §§ 396a-396f (1988), does not expire because of a temporary shut-in caused by a mechanical breakdown or accident, as long as the shut-in does not continue beyond the time reasonably necessary to make repairs and resume production.

Citation Oilfield Supply & Leasing, Ltd. & Murphy Oil U.S.A., Inc. v. Acting Billings Area Director, Bureau of Indian Affairs, 23 IBIA 163 (Jan. 28, 1993)

INDIANS--Continued

LEASES AND PERMITS--Continued

Generally--Continued

The Bureau of Indian Affairs is bound by the terms of leases it has approved, when the leases are not in conflict with governing regulations.

American Indian Land Development Corp. v. Sacramento Area Director, Bureau of Indian Affairs, 23 IBIA 208 (Feb. 25, 1993)

BIA officials are not authorized to grant leases of tribal land.

Lower Peoples Creek Cooperative v. Acting Billings Area Director, Bureau of Indian Affairs, 23 IBIA 297 (Apr. 22, 1993)

The BIA is bound by the terms of leases it has approved, when the leases are not in conflict with governing regulations. Specifically, the parties can agree to extend the period established in 25 CFR 162.14 during which a breach of a lease can be cured.

The starting point for understanding a contract is the language of the document.

The lessee of trust or restricted property is responsible for ensuring that actions taken under the lease are properly approved.

Nevaco, Inc. & Pyramid Lake Paiute Tribe of Indians v. Acting Phoenix Area Director, Bureau of Indian Affairs, 24 IBIA 157 (Aug. 31, 1993)

INDIANS--Continued

LEASES AND PERMITS--Continued

Generally--Continued

The determination of the nature of an agreement relating to the use of Indian trust land is a question of Federal law. It is appropriate to apply state contract law to this determination only when there are no Federal cases on point, and then only so far as state law does not conflict with the Federal interest in protecting the use of Indian resources. The decisions of the Board of Indian Appeals are part of the Federal law relating to contracts involving the use of trust land.

An agreement which is, in essence, a lease of Indian trust land, although not so termed, is invalid unless approved by the Secretary of the Interior. Lacking approval, it grants no rights to either party.

Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 169 (Aug. 31, 1993)

Decisions concerning whether or not to grant a lease of trust or restricted land are committed to the discretion of the BIA. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

In leasing individually owned trust or restricted property, BIA is responsible to all of the landowners, not to a group of co-owners. Furthermore, the Bureau's responsibility is not to the Tribe or to tribal members in general.

Theresa Jerry Moses et al. v. Acting Portland Area Director, Bureau of Indian Affairs, 24 IBIA 233 (Sept. 29, 1993)

INDIANS--Continued

LEASES AND PERMITS--Continued

Generally--Continued

Where BIA implements a tribal policy concerning the leasing of Indian lands on the tribe's reservation, the Bureau shares the tribe's responsibility to inform affected persons about the requirements of the policy.

Where a tribe has adopted a policy concerning "owner's use" of land in fractionated ownership, the provisions of 25 CFR 162.2(a)(4) must be read in conjunction with the tribal policy.

Decisions concerning whether or not to grant a lease of trust or restricted land are committed to the discretion of BIA. It is not the Board's function, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Vincent Blackhawk v. Billings Area Director, Bureau of Indian Affairs, 24 IBIA 275 (Oct. 21, 1993)

Arbitration

Parties to a lease of trust or restricted property may contract to use arbitration to resolve disputes arising under the lease. Under such circumstances, the use of arbitration is a matter of contract between the parties and will be enforced in accordance with the apparent intent of the parties.

American Indian Land Development Corp. v. Sacramento Area Director, Bureau of Indian Affairs, 23 IBIA 208 (Feb. 25, 1993)

INDIANS--Continued

LEASES AND PERMITS--Continued

Farming and Grazing

Damages for livestock trespass on trust or restricted are properly determined in accordance with the formula set forth in 25 CFR 166.24.

Trespass damages can be assessed against any person whose livestock is found on trust or restricted property for which that person does not have an approved grazing permit.

Darrell Rathkamp v. Acting Billings Area Director, Bureau of Indian Affairs, 23 IBIA 266 (Mar. 24, 1993)

Secretarial Approval

Under 25 U.S.C. § 380 (1988), and 25 CFR 162.2(a)(4), the BIA may grant leases of individually owned trust or restricted land when the heirs have not been able to agree upon a lease during a 3-month period, provided the land is not in use by any of the heirs.

Lower Peoples Creek Cooperative v. Acting Billings Area Director, Bureau of Indian Affairs, 23 IBIA 297 (Apr. 22, 1993)

Under 25 CFR 162.2(a)(4), the BIA has discretion in determining whether to approve a proposed lease of trust or restricted property when the owners have not agreed to a lease.

Joe Brooks v. Muskogee Area Director, Bureau of Indian Affairs, 25 IBIA 31 (Nov. 12, 1993)

INDIANS--Continued

MINERAL RESOURCES

Gravel

Under Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983), gravel is a mineral reserved to the U.S. by sec. 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1988). When an Indian tribe receives title to minerals reserved under this provision, it receives title to the reserved gravel.

Sampsel J. Bitz v. Acting Billings Area Director, Bureau of Indian Affairs, 23 IBIA 286 (Apr. 6, 1993)

Oil and Gas

Generally

A lease issued under the IMLA, 25 U.S.C. §§ 396a-396f (1988), does not expire because of a temporary shut-in caused by a mechanical breakdown or accident, as long as the shut-in does not continue beyond the time reasonably necessary to make repairs and resume production.

Citation Oilfield Supply & Leasing, Ltd. & Murphy Oil U.S.A., Inc. v. Acting Billings Area Director, Bureau of Indian Affairs, 23 IBIA 163 (Jan. 28, 1993)

When an oil and gas development agreement entered into under the Indian Mineral Development Act, 25 U.S.C. §§ 2101-2108 (1988), provides that it remains in effect after its initial term as long as oil and/or gas is produced in paying quantities, it expires by its own terms when production in paying quantities ceases.

Jay Magness v. Albuquerque Area Director, Bureau of Indian Affairs, 25 IBIA 65 (Dec. 6, 1993)

INDIANS--Continued

MINERAL RESOURCES--Continued

Oil and Gas--Continued

Royalties

"Bona fide selling price," "posted price," and "offered price." These words are defined for purposes of 25 CFR Part 226.

A sale price that is not offered to a producer is not an "offered price" as to that producer within the meaning and intent of 25 CFR 226.11(a)(2).

For purposes of determining the amount of royalty due to the Osage Tribe under 25 CFR 226.11, the price paid pursuant to a contract for the future delivery of crude oil does not constitute an "offered price" on the actual date of purchase.

Okie Crude Co., et al. v. Muskogee Area Director, Bureau of Indian Affairs, 23 IBIA 174 (Feb. 5, 1993)

Regulations are interpreted in accordance with traditional principles of statutory construction. Where a BIA regulation contains parallel sections applicable to different classes of persons, and one section is lacking a provision which is included in the other section, the omission is significant to show that a different intent existed.

The regulations in 25 CFR Part 226 do not authorize a gas lessee to deduct allowances from royalties owing to the Osage Tribe.

ZCA Gas Gathering, Inc. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 23 IBIA 228 (Mar. 8, 1993)

INDIANS--Continued

SOCIAL SERVICES

The BIA is not authorized, either by the regulations governing the Bureau's general assistance program or by the corresponding provisions of the BIA Manual, to require a non-Indian spouse of a grant recipient to submit job search reports. However, the Bureau may require the grant recipient to submit verified information concerning the spouse's employment situation.

Pat Hayes v. Anadarko Area Director, Bureau of Indian Affairs, 25 IBIA 50 (Nov. 30, 1993)

TRIBAL GOVERNMENT

Constitutions, Bylaws, and Ordinances

Although required by statute, review of amendments to the IRA constitutions is an intrusion into tribal self-government. Review should therefore be undertaken in such a way as to avoid unnecessary interference with tribal self-government.

Cheyenne River Sioux Tribe v. Aberdeen Area Director, Bureau of Indian Affairs, 24 IBIA 55 (June 15, 1993)

Tribal legislation is not subject to review or approval by the BIA unless a Federal statute or the tribal constitution so provides.

Even where BIA involvement in tribal matters is required by Federal or tribal law, or is necessary to implement the government-to-government relationship, the Bureau must act in such a way as to avoid unnecessary interference with tribal self-government.

INDIANS--Continued

TRIBAL GOVERNMENT--Continued

Constitutions, Bylaws, and Ordinances--Continued

Intra-tribal controversies concerning the validity of tribal council actions are properly resolved in tribal courts or other tribal forums.

Wallace W. Wells, Jr., Randy Shields, & Leonard Pease, Jr. v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 24 IBIA 142 (Aug. 19, 1993)

Proposals for constitutional amendments made by the tribal councils of the Five Tribes are not subject to the legislation approval requirement of sec. 28 of the Five Tribes Act of Apr. 26, 1906, 34 Stat. 137.

Under the Act of Oct. 22, 1970, 84 Stat. 1091, procedures for the selection of the principal chiefs of the Cherokee, Choctaw, Muscogee (Creek) and Seminole Nations and the governor of the Chickasaw Nation are subject to approval by the Secretary of the Interior.

Where a tribal constitution gives a BIA official authority to approve or disapprove amendments, and no limitations are placed on that authority by the constitution or by Federal statute, the Bureau official has the discretion to disapprove an amendment which would remove the requirement for approval of future amendments.

Seminole Nation of Oklahoma v. Acting Director, Office of Tribal Services, Bureau of Indian Affairs, 24 IBIA 209 (Sept. 23, 1993)

INDIANS--Continued

TRIBAL GOVERNMENT--Continued

Judicial_System

Intra-tribal controversies concerning the validity of tribal council actions are properly resolved in tribal courts or other tribal forums.

Wallace W. Wells, Jr., Randy Shields, & Leonard Pease, Jr. v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 24 IBIA 142 (Aug. 19, 1993)

TRIBAL ORGANIZATION

Oklahoma_Tribes

Absent convincing evidence, the Board cannot conclude that the requirement for approval of tribal legislation in sec. 28 of the Five Tribes Act of Apr. 26, 1906, 34 Stat. 137, was impliedly repealed by the Oklahoma Indian Welfare Act, 25 U.S.C. § 503 (1988).

Proposals for constitutional amendments made by the tribal councils of the Five Tribes are not subject to the legislation approval requirement of sec. 28 of the Five Tribes Act of Apr. 26, 1906, 34 Stat. 137.

Under the Act of Oct. 22, 1970, 84 Stat. 1091, procedures for the selection of the principal chiefs of the Cherokee, Choctaw, Muscogee (Creek) and Seminole Nations and the governor of the Chickasaw Nation are subject to approval by the Secretary of the Interior.

Seminole Nation of Oklahoma v. Acting Director, Office of Tribal Services, Bureau of Indian Affairs, 24 IBIA 209 (Sept. 23, 1993)

INDIANS--Continued

TRIBAL POWERS

Generally

The Board of Indian Appeals has jurisdiction over decisions issued by BIA officials under 25 CFR Chapter I. It does not have jurisdiction over decisions made by duly constituted tribal officials or governing bodies.

Arthur J. Welmas & Linda Streeter Dukic, Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 264 (Oct. 20, 1993)

Self-Determination

When statutorily required review of tribal decisions by the DOI constitutes an intrusion into tribal self-government, the Department should undertake that review in such a way as to avoid unnecessary interference with tribal self-government.

Ottawa Indian Tribe of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 24 IBIA 92 (July 8, 1993)

Tribal Sovereignty

Respect for tribal self-government requires that tribal remedies be exhausted before a Federal forum may entertain a challenge to tribal actions or authority. This is particularly true where the matter at issue involves tribal membership.

INDIANS--Continued

TRIBAL POWERS--Continued

Tribal Sovereignty--Continued

Indian tribes have the power to restrict the assignment of tribal lands to tribal members.

Janie Jovita Flores et al. v. Acting Anadarko Area Director, Bureau of Indian Affairs, 25 IBIA 6 (Nov. 12, 1993)

TRUST RESPONSIBILITY

There is nothing in the legislative histories of the Hawaiian Homes Commission Act of 1920, 42 Stat. 108, as amended (HHCA), or the Hawaiian Statehood, 73 Stat. 4 (1959), to indicate the creation of a trust relationship between the United States and native Hawaiians. This opinion concludes that the United States had no trust responsibilities to the native Hawaiians either before Statehood or after.

Deputy Solicitor Ferguson's letter of Aug. 27, 1979, regarding the United States as trustee to Hawaiian natives for the years 1920 to 1959, is expressly overruled to the extent it is inconsistent with this memorandum.

The Scope of Federal Responsibility for Native Hawaiians Under the Hawaiian Homes Commission Act, M-36978 (Jan. 19, 1993) 100 I.D. 431

In actions relating to the sale of an individual Indian's interest in trust property to another Indian or an Indian tribe, BIA's trust duty is to the Indian for whom the interest is held in trust, not the prospective purchaser or purchasers.

Kenneth Gullickson v. Aberdeen Area Director, Bureau of Indian Affairs, 24 IBIA 247 (Oct. 14, 1993)

INDIANS--Continued

TRUST RESPONSIBILITY--Continued

In a matter concerning the use and/or distribution of funds generated from tribal lands, the BIA trust responsibility is to the tribe.

Arthur J. Welmas & Linda Streeter Dukic, Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 264 (Oct. 20, 1993)

In matters relating to the use of tribal property, the BIA's trust responsibility is to the tribe, not a person doing business with the tribe, even though that person may be Indian and a tribal member.

Robert & Krista Johnson v. Acting Phoenix Area Director, Bureau of Indian Affairs, 25 IBIA 18 (Nov. 12, 1993)

JUDICIAL REVIEW

(See also Administrative Procedure)

A statute establishing time limitations for the commencement of judicial actions for damages on behalf of the U.S. does not limit administrative proceedings within the DOI.

Bolling Construction Co. & Bob Bolling, 125 IBLA 303 (Mar. 16, 1993)

LIEU SELECTIONS

A right to select lieu lands under the authority of sec. 13 of the Act of Mar. 13, 1921, 41 Stat. 1239, was a claim required to be recorded with the Department within 2 years from the effective date of the Act of Aug. 5, 1955, 69 Stat. 534. Failure to present the claim within the time established by the 1955 Recordation Act barred acquisition of the land. Filing a selection application in 1946 did not constitute compliance with the 1955 recordation requirement.

Tommy Chavez, 127 IBLA 395 (Nov. 2, 1993)

MATERIALS ACT

The regulations at 43 CFR 3603.1 and 43 CFR 9239.0-7 prohibit the removal of mineral material except when authorized by a sale or permit issued under the Materials Act and Departmental regulations. A finding that no trespass occurred because BLM authorized the removal of gravel by means other than issuance of a permit or sales contract will be reversed.

When BLM has indicated to a trespasser that gravel extraction operations may continue, there is no basis for concluding that the continued operations were unreasonable or lacked good faith. Absent evidence showing knowledge that the violation is occurring or a reckless disregard for whether a violation is occurring, there is no justification for imposing what are essentially punitive damages for willful trespass. In such a case the Board will find, in the interest of fundamental fairness, that BLM is precluded from charging that the operator, who remained in trespass with permission to continue operations, but absent formal authorization, was in willful trespass.

Absent clearly controlling state law, damages for unintentional gravel trespass may be based on either the value of the gravel in place or market value at the site

MATERIALS ACT--Continued

of the processed gravel, less the expenses of severing and processing it, whichever is greater.

Richard Connie Nielson v. The Bureau of Land Management,
125 IBLA 353 (Mar. 30, 1993)

MIGRATORY BIRD CONSERVATION ACT

(See also Wildlife Refuges & Projects)

GENERALLY

The approval of a mining plan of operations does not involve a "taking" of migratory birds under the Migratory Bird Treaty Act, 16 U.S.C. § 703 (1988). This Act was not intended to include habitat modification or degradation among its prohibitions.

Nat'l Wildlife Federation et al., 126 IBLA 48 (Apr. 14, 1993)

MILLSITES

(See also Mining Claims)

GENERALLY

The failure of the owner of a millsite to file an annual notice of intention to hold the millsite is a curable defect and before BLM declares a millsite abandoned and void for failure to make such a filing, it must provide the owner notice and an opportunity to cure the defect.

Where BLM declares a millsite abandoned and void following a failure by the owner of the millsite to

MILLSITES--Continued

GENERALLY--Continued

respond to a notice of an annual filing deficiency, and later vacates that decision, concluding that the annual filing had been made, it may not subsequently retroactively reinstate the abandoned and void decision. Notice and an opportunity to cure must be given, and, if no filing is made in response thereto, a new decision must be issued. The effective date of abandonment will run from the date of that new decision.

Libra Mining & Mineral Corp., Floyd Robertson, 128 IBLA 84 (Dec. 10, 1993)

MINERAL LANDS

(See also Mining Claims)

PROSPECTING PERMITS

Lands, including mineral estates, which have never left the ownership of the United States are public domain lands and the patenting of public domain lands, with a reservation of the minerals, to a state pursuant to the Bankhead-Jones Farm Tenant Act of July 22, 1937, as amended, does not transform the retained mineral estate into acquired lands. BLM properly rejects a hardrock minerals prospecting permit for reserved public domain minerals where the regulations governing hardrock mineral leasing do not authorize the leasing of such public domain minerals.

Scott J. Hill, 126 IBLA 16 (Apr. 2, 1993)

MINERAL LANDS--Continued

PROSPECTING PERMITS--Continued

The Secretary has discretionary authority to issue mineral prospecting permits when prospecting or exploratory work is necessary to determine the existence of workability of a particular hardrock mineral deposit. It is not appropriate to issue a prospecting permit if there is sufficient data regarding the quality and quantity of a deposit to conclude that only an increase in the price of the commodity would render a deposit workable.

BLM may reject a prospecting permit if further prospecting or exploratory work would not disclose the existence or workability of a deposit of hardrock mineral. A deposit is considered workable when the value of the commodity is greater than the cost of extracting it. A workability determination is made by examining only those factors directly related to production of the mineral.

When considering what evidentiary burden should be placed upon BLM in an appeal from a rejection of a prospecting permit application, it is proper to weigh the cost of that burden against the nature of the appellant's interest and the risk that an appellant would be improperly deprived of that interest if the greater burden were not placed on BLM. A prospecting permit applicant holds an expectancy and not an interest in the land and BLM is not required to sustain its workability determinations with the same quantum of evidence needed to sustain a discovery determination under the 1872 Mining Law.

Vanderbilt Gold Corp., 126 IBLA 72 (Apr. 19, 1993)

MINERAL LEASING ACT

(See also Bureau of Land Management, Coal Leases & Permits, Geothermal Leases, Oil & Gas Leases, Phosphate Leases & Permits, Potassium Leases & Permits, Sodium Leases & Permits)

GENERALLY

BLM properly rejected sodium prospecting permit applications for lands withdrawn from sodium leasing (except if the Secretary or his delegate should find that development of the sodium would not adversely affect oil shale values) when BLM concluded that additional information from operations on existing leases was needed to determine whether sodium production would significantly damage oil shale resources.

Harry E. McCarthy et al., 128 IBLA 36 (Nov. 16, 1993)

The date of expiration of the permits is the critical date for determination of a discovery on sodium prospecting permits entitling the holder to the issuance of sodium preference right leases. Evidence concerning costs and market conditions after that date have relevance only to the extent they reflect what may have reasonably been anticipated at the expiration of the permits. Yankee Gulch Joint Venture v. BLM, 113 IBLA 106 (1990).

Where the Board has held that a hearing is required before an ALJ to determine whether a valuable deposit of sodium has been shown by a prospecting permittee applying for a preference right lease, evidence of the quantity and quality of the deposit is admissible to the extent it tends to show whether the deposit can be mined, processed, and marketed at a profit. A prior stipulation by BLM as to the sufficiency of the initial showing as to quantity and quality will not preclude evidence on the quantity and quality of the deposit of sodium.

The test for determining whether a permittee has discovered a valuable deposit of sodium justifying issuance of a preference right lease is similar to the test for determining whether the locator of a mining

MINERAL LEASING ACT--Continued

GENERALLY--Continued

claim under the 1872 Mining Law, 30 U.S.C. § 21 (1988), has discovered a valuable mineral deposit, i.e., whether the mineral deposit found within the limits of the claim is of such quantity and quality that a prudent person would be justified in the further expenditure of his labor and funds with a reasonable prospect of success in developing a paying mine. This standard has been further refined to include a showing of marketability, a reasonable expectation that the mineral can be extracted, processed, and marketed at a profit.

Bureau of Land Management v. Eugene Simons, 128 IBLA 99 (Dec. 20, 1993)

ENVIRONMENT

A decision approving a right-of-way for an oil and gas pipeline on public lands on the basis of an EA finding no significant impact which is tiered to a programmatic EIS for oil and gas leasing in the area will be affirmed where BLM has considered the cumulative impact of the right-of-way and the foreseeable oil and gas development to be served thereby and the record provides a reasonable basis for the conclusion that there will be no significant impacts other than those addressed in the EIS.

Southern Utah Wilderness Alliance, 127 IBLA 282 (Oct. 7, 1993)

MINERAL LEASING ACT FOR ACQUIRED LANDS

GENERALLY

Under sec. 3 of the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 352 (1988), the Secretary of the Interior lacks authority to issue an oil and gas lease over the objection of the agency having jurisdiction of the acquired land.

Blue Ridge Oil & Gas Exploration, Inc., 127 IBLA 279 (Oct. 5, 1993)

MINING CLAIMS

(See also Hearings, Millsites, Mineral Lands, Multiple Mineral Development Act, Surface Resources Act)

CONTESTS

Because BLM failed to show that a mining claim was not used or occupied for purposes reasonably incident to mining, it was proper to find that the Government had not demonstrated any impermissible use contrary to provision of 30 U.S.C. § 612(a) (1988), and contest proceedings against the claim were properly dismissed as a result.

United States v. William Doherty, 125 IBLA 296 (Mar. 16, 1993)

Federal employees charged with the management of Federal lands have the right and authority to challenge the validity of mining claims for any reason.

Evidence that valuable mineral had been successfully produced from the claims is not sufficient to

MINING CLAIMS--Continued

CONTESTS--Continued

establish a discovery without additional evidence that material of a similar grade remains on the claims. Without a showing that additional mineral material of a similar quality remains on the claims, the logical conclusion is that the mined material was an isolated showing.

Standing alone, the Government's reason for conducting a mineral examination or initiating a contest is not sufficient to establish error in a finding that a mining claim is not supported by a discovery. Without a showing that evidence was deliberately or inadvertently skewed to support a finding that the claims were invalid, it cannot be said that the mineral examiner's motivation has affected the evidence or the presentation at the hearing, or that the Government's motivation ultimately affected the ALJ's conclusion that the claims were not supported by a valuable mineral deposit.

When presenting evidence to overcome a Government's prima facie case that the claim is not supported by a discovery the claimants are not limited to rebutting the evidence submitted by the mineral examiners, and may present evidence of the location of the claims and the location of mineralization at any place on the claims, including places not examined or sampled by the mineral examiners.

United States v. Estate of Melvin E. Viles, Mary S. Viles, 126 IBLA 162 (May 10, 1993)

Where the U.S. contests a mining claim for lack of discovery, the Government must go forward with sufficient evidence to establish prima facie the invalidity of the contested claims. When the Government's prima facie case has been made, the burden then shifts to the claimant to overcome this showing by a preponderance.

A placer discovery (assuming it exists), will not support a lode location. Exposure of a vein or lode carrying mineral values in place is a necessary precondition to the validity of a lode claim. Government

MINING CLAIMS--Continued

CONTESTS--Continued

mineral examiners are not required to perform discovery work for claimants or explore beyond a claimant's exposed workings. It is therefore incumbent upon a mining claimant to keep his discovery points available for inspection by Government mineral examiners. When a mining claimant fails to do so, he assumes the risk that the mineral examiner will be unable to verify a discovery. In such case an unsupported allegation that the samples taken by the examiner were not representative of the mineral deposit on the lode claims will not overcome a prima facie case that there is no discovery.

A continuance of a hearing into the validity of a mining claim will only be granted where the mining claimant presents sufficient reason to justify the grant of an additional opportunity to present his case, *i.e.*, where circumstances have placed a substantial constraint upon his ability to obtain or offer samples or other evidence of a discovery.

As against the U.S., a mining claimant acquires no vested rights by location of a mining claim. Even though a claim may be perfected in all other respects, unless and until a claimant is able to show that the claim is supported by a discovery of valuable locatable mineral within the boundaries of the claim, no rights are acquired. As the title owner, the U.S. may regulate mining activities in national forests in order to protect surface resources. Therefore, the motivation of the managing Government agency in initiating a contest against a mining claimant is irrelevant.

United States v. Mineco, United States v. Cyrus L. & Mary F. Colburn, United States v. Cache Properties, 127 IBLA 181 (Sept. 7, 1993)

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY

Federal employees charged with the management of Federal lands have the right and authority to challenge the validity of mining claims for any reason.

Evidence that valuable mineral had been successfully produced from the claims is not sufficient to establish a discovery without additional evidence that material of a similar grade remains on the claims. Without a showing that additional mineral material of a similar quality remains on the claims, the logical conclusion is that the mined material was an isolated showing.

Standing alone, the Government's reason for conducting a mineral examination or initiating a contest is not sufficient to establish error in a finding that a mining claim is not supported by a discovery. Without a showing that evidence was deliberately or inadvertently skewed to support a finding that the claims were invalid, it cannot be said that the mineral examiner's motivation has affected the evidence or the presentation at the hearing, or that the Government's motivation ultimately affected the ALJ's conclusion that the claims were not supported by a valuable mineral deposit.

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United States v. Estate of Melvin E. Viles, Mary S. Viles, 126 IBLA 162 (May 10, 1993)

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

Under the prudent man test, a discovery exists where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a paying mine.

Where the U.S. contests a mining claim for lack of discovery, the Government must go forward with sufficient evidence to establish prima facie the invalidity of the contested claims. When the Government's prima facie case has been made, the burden then shifts to the claimant to overcome this showing by a preponderance.

A placer discovery (assuming it exists), will not support a lode location. Exposure of a vein or lode carrying mineral values in place is a necessary precondition to the validity of a lode claim. Government mineral examiners are not required to perform discovery work for claimants or explore beyond a claimant's exposed workings. It is therefore incumbent upon a mining claimant to keep his discovery points available for inspection by Government mineral examiners. When a mining claimant fails to do so, he assumes the risk that the mineral examiner will be unable to verify a discovery. In such case an unsupported allegation that the samples taken by the examiner were not representative of the mineral deposit on the lode claims will not overcome a prima facie case that there is no discovery.

As against the U.S., a mining claimant acquires no vested rights by location of a mining claim. Even though a claim may be perfected in all other respects, unless and until a claimant is able to show that the claim is supported by a discovery of valuable locatable mineral within the boundaries of the claim, no rights are acquired. As the title owner, the U.S. may regulate mining activities in national forests in order to protect surface resources. Therefore, the motivation of

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

the managing Government agency in initiating a contest against a mining claimant is irrelevant.

United States v. Mineco, United States v. Cyrus L. & Mary F. Colburn, United States v. Cache Properties,
127 IBLA 181 (Sept. 7, 1993)

DISCOVERY

Generally

Evidence that valuable mineral had been successfully produced from the claims is not sufficient to establish a discovery without additional evidence that material of a similar grade remains on the claims. Without a showing that additional mineral material of a similar quality remains on the claims, the logical conclusion is that the mined material was an isolated showing.

Standing alone, the Government's reason for conducting a mineral examination or initiating a contest is not sufficient to establish error in a finding that a mining claim is not supported by a discovery. Without a showing that evidence was deliberately or inadvertently skewed to support a finding that the claims were invalid, it cannot be said that the mineral examiner's motivation has affected the evidence or the presentation at the hearing, or that the Government's motivation ultimately affected the ALJ's conclusion that the claims were not supported by a valuable mineral deposit.

When presenting evidence to overcome a Government's prima facie case that the claim is not supported by a discovery the claimants are not limited to rebutting the evidence submitted by the mineral examiners, and may present evidence of the location of the claims and the location of mineralization at any place on the claims,

MINING CLAIMS--Continued

DISCOVERY--Continued

Generally--Continued

including places not examined or sampled by the mineral examiners.

United States v. Estate of Melvin E. Viles, Mary S. Viles, 126 IBLA 162 (May 10, 1993)

Under the prudent man test, a discovery exists where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a paying mine.

United States v. Mineco, United States v. Cyrus L. & Mary F. Colburn, United States v. Cache Properties, 127 IBLA 181 (Sept. 7, 1993)

ENVIRONMENT

A determination by an authorized officer that dredging operations capable of moving over 2,400 yards of earth annually within the meaning of 43 CFR 3809.0-5 from the Merced River did not constitute "casual use" was not overcome by an allegation that less than 5 acres of land would be disturbed by such activity.

A reclamation bond was properly required for operations conducted within a wild and scenic river study area pursuant to a plan of operations. 43 CFR 3809.1-9(b).

Lloyd L. Jones, 125 IBLA 94 (Jan. 8, 1993)

MINING CLAIMS--Continued

HEARINGS

A continuance of a hearing into the validity of a mining claim will only be granted where the mining claimant presents sufficient reason to justify the grant of an additional opportunity to present his case, i.e., where circumstances have placed a substantial constraint upon his ability to obtain or offer samples or other evidence of a discovery.

United States v. Mineco, United States v. Cyrus L. & Mary F. Colburn, United States v. Cache Properties,
127 IBLA 181 (Sept. 7, 1993)

LANDS SUBJECT TO

BLM properly declared placer mining claims partially null and void ab initio that included land which, at the time of location, was subject to a license for a power project under a powersite withdrawal and was therefore closed to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955, as amended, 30 U.S.C. § 621(a) (1988).

Bob & Kayla Alejandre, 125 IBLA 104 (Jan. 12, 1993)

A mining claim located upon lands withdrawn from mineral entry is properly declared null and void.

Where lands are withdrawn from location under the mining law, "subject to valid existing rights," the withdrawal attaches, as of the date of the withdrawal, to all land described by the withdrawal, including the lands covered by unpatented mining claims. The withdrawal is not effective against the claimant's possessory right, but, if the withdrawal is still in existence at the time the claims are abandoned, the withdrawal becomes effective, eo instanti, as to the

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

land covered by such claims, and future mining claim locations are precluded.

Cotter Corp., 127 IBLA 18 (July 13, 1993)

A decision declaring a mining claim null and void ab initio will be affirmed where the lands embraced in the claim were conveyed to the U.S. in a State land exchange pursuant to sec. 8 of the Taylor Grazing Act subject to a reservation of the mineral estate.

UOP, 127 IBLA 105 (Aug. 9, 1993)

Mining claims located on lands closed to mineral entry are null and void ab initio. Because such claims create no property rights, no rights were infringed when BLM found three claims located on lands closed to mineral entry to be null and void.

Barbara J. Cole, 127 IBLA 120 (Aug. 18, 1993)

That portion of a mining claim located on land subject to a pre-existing highway right-of-way granted to the State of California pursuant to the Federal Highway Act of Nov. 9, 1921, 42 Stat. 212, now the Federal Aid Highway Act, 23 U.S.C. § 317 (1988), is null and void ab initio.

Jesse R. Collins et al., 127 IBLA 122 (Aug. 23, 1993)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

A placer mining claim was properly declared null and void because it was located on land withdrawn from mining when the claimants failed to show that they had an unbroken chain of title to locators of a claim located prior to withdrawal.

Placer mining claimants who rely on the provisions of 30 U.S.C. § 38 (1988), to prove location and posting of a mining claim at a time when the land embraced by the location was open to location must comply with the recordation requirements of sec. 314 of FLPMA, 43 U.S.C. § 1744 (1988). Where such a claim has not been recorded, it is a nullity.

Gary Hoefler et al., 127 IBLA 211 (Sept. 14, 1993)

LOCATION

Where lands are withdrawn from location under the mining law, "subject to valid existing rights," the withdrawal attaches, as of the date of the withdrawal, to all land described by the withdrawal, including the lands covered by unpatented mining claims. The withdrawal is not effective against the claimant's possessory right, but, if the withdrawal is still in existence at the time the claims are abandoned, the withdrawal becomes effective, eo instanti, as to the land covered by such claims, and future mining claim locations are precluded.

Cotter Corp., 127 IBLA 18 (July 13, 1993)

MINING CLAIMS--Continued

LOCATION--Continued

A decision declaring a mining claim null and void ab initio will be affirmed where the lands embraced in the claim were conveyed to the U.S. in a State land exchange pursuant to sec. 8 of the Taylor Grazing Act subject to a reservation of the mineral estate.

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Placer mining claimants who rely on the provisions of 30 U.S.C. § 38 (1988), to prove location and posting of a mining claim at a time when the land embraced by the location was open to location must comply with the recordation requirements of sec. 314 of FLPMA, 43 U.S.C. § 1744 (1988). Where such a claim has not been recorded, it is a nullity.

Gary Hoefler et al., 127 IBLA 211 (Sept. 14, 1993)

Mining claims located on land segregated from appropriation under the mining law by a proposed classification decision made pursuant to 43 CFR 2741.4(h) (1985) are null and void ab initio.

Edgar Sebastian Roberts, 127 IBLA 217 (Sept. 21, 1993)

MINING CLAIMS--Continued

LODE CLAIMS

A placer discovery (assuming it exists), will not support a lode location. Exposure of a vein or lode carrying mineral values in place is a necessary precondition to the validity of a lode claim. Government mineral examiners are not required to perform discovery work for claimants or explore beyond a claimant's exposed workings. It is therefore incumbent upon a mining claimant to keep his discovery points available for inspection by Government mineral examiners. When a mining claimant fails to do so, he assumes the risk that the mineral examiner will be unable to verify a discovery. In such case an unsupported allegation that the samples taken by the examiner were not representative of the mineral deposit on the lode claims will not overcome a prima facie case that there is no discovery.

United States v. Mineco, United States v. Cyrus L. & Mary F. Colburn, United States v. Cache Properties,
127 IBLA 181 (Sept. 7, 1993)

MILLSITES

The failure of the owner of a millsite to file an annual notice of intention to hold the millsite is a curable defect and before BLM declares a millsite abandoned and void for failure to make such a filing, it must provide the owner notice and an opportunity to cure the defect.

Where BLM declares a millsite abandoned and void following a failure by the owner of the millsite to respond to a notice of an annual filing deficiency, and later vacates that decision, concluding that the annual filing had been made, it may not subsequently retroactively reinstate the abandoned and void decision. Notice and an opportunity to cure must be given, and, if no filing is made in response thereto, a new decision

MINING CLAIMS--Continued

MILLSITES--Continued

must be issued. The effective date of abandonment will run from the date of that new decision.

Libra Mining & Mineral Corp., Floyd Robertson, 128 IBLA 84 (Dec. 10, 1993)

PATENT

Where BLM determines that an application for mineral patent is deficient in information required by 43 CFR 3862.1, and notifies the applicant that the information must be submitted or the application will be rejected, BLM may properly reject the mineral patent application where the applicant fails to file the requested information within the time provided.

Karen Lynne Smith Harper, 126 IBLA 301 (June 14, 1993)

PLACER CLAIMS

BLM properly declared placer mining claims partially null and void ab initio that included land which, at the time of location, was subject to a license for a power project under a powersite withdrawal and was therefore closed to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955, as amended, 30 U.S.C. § 621(a) (1988).

Bob & Kayla Alejandre, 125 IBLA 104 (Jan. 12, 1993)

MINING CLAIMS--Continued

PLACER CLAIMS--Continued

Pursuant to 30 U.S.C. § 36 (1988), and 43 CFR 3842.1-3, placer mining claim locations may not contain noncontiguous tracts of land.

Jesse R. Collins et al., 127 IBLA 122 (Aug. 23, 1993)

PLAN OF OPERATIONS

A determination by an authorized officer that dredging operations capable of moving over 2,400 yards of earth annually within the meaning of 43 CFR 3809.0-5 from the Merced River did not constitute "casual use" was not overcome by an allegation that less than 5 acres of land would be disturbed by such activity.

Lloyd L. Jones, 125 IBLA 94 (Jan. 8, 1993)

BLM properly required the operator of a placer mining claim to conform suction dredging operations in a river designated for potential addition to the national wild and scenic rivers system and related occupancy to a modified plan of operations because such operations do not constitute casual use under 43 CFR 3809.0-5 (1991).

Pierre J. Ott, 125 IBLA 250 (Feb. 11, 1993)

Approval of a mining plan of operations will be set aside and remanded where the record indicates that BLM analyzed the plan of operations and reviewed environmental impacts, but conditioned approval of the plan on the performance of measures which may be inadequate to mitigate or prevent any unnecessary or undue environmental degradation.

Nat'l Wildlife Federation et al., 126 IBLA 48 (Apr. 14, 1993)

MINING CLAIMS--Continued

PLAN OF OPERATIONS--Continued

When a mining claim is located partially within a WSA, the regulations in 43 CFR Part 3802 apply, and BLM may properly issue a notice of noncompliance requiring a mining claimant to remove unauthorized structures for a WSA, reclaim disturbed lands, and submit a plan of operations and reclamation bond.

Paul M. Shock, 126 IBLA 232 (May 27, 1993)

A road constructed to provide motor vehicle access to a mining claim located in a WSA without first obtaining an approved plan of operations permitting such activity pursuant to provision of 43 CFR 3802.1-1(a) was properly required to be reclaimed.

Lloyd L. Jones, 127 IBLA 270 (Oct. 1, 1993)

A petition for stay of a decision denying a mining plan of operations in a WSA, if granted, would not authorize the activities set forth in that plan. The granting of a stay would merely mean that the denial would not be effective during the pendency of the stay; it would not constitute approval of the pending plan of operations.

Robert E. Oriskovich, 128 IBLA 69 (Dec. 6, 1993)

A plan of operations is properly required under 43 CFR Part 3809 where BLM determines that unreclaimed surface disturbance from previous years together with proposed operations will cause a cumulative surface disturbance of more than 5 acres.

A person who is not the owner of a claim but performs assessment work is an "operator" as defined by 43 CFR 3809.0-5(g) and is properly issued a notice of

MINING CLAIMS--Continued

PLAN OF OPERATIONS--Continued

noncompliance for failure to complete the reclamation required under an approved plan of operations.

Del M. Ackels dba Gold Dust Mines, 128 IBLA 72 (Dec. 7, 1993)

POSSESSORY RIGHT

In light of the adoption of sec. 314(b) of FLPMA, 43 U.S.C. § 1744(b) (1988), the provisions of 30 U.S.C. § 38 (1988), may not be used to establish rights under the mining laws of the U.S. for claims which have not been duly recorded with BLM under sec. 314(b).

Robert L. Mendenhall et al., 127 IBLA 73 (July 20, 1993)

Placer mining claimants who rely on the provisions of 30 U.S.C. § 38 (1988), to prove location and posting of a mining claim at a time when the land embraced by the location was open to location must comply with the recordation requirements of sec. 314 of FLPMA, 43 U.S.C. § 1744 (1988). Where such a claim has not been recorded, it is a nullity.

Gary Hoefler et al., 127 IBLA 211 (Sept. 14, 1993)

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD

The Board will apply the doctrine of estoppel in reversing a 1991 decision of BLM declaring mining claims situated in the Death Valley National Monument abandoned and void for failure to file a notice of intent to hold the claims in 1979, where confusion existed regarding recordation and filing requirements under the Mining in the Parks Act and FLPMA and the claimants inquired of

MINING CLAIMS--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK
OR NOTICE OF INTENTION TO HOLD--Continued

BLM in 1979 whether they were required to make additional filings for their claims during 1979, and in response BLM not only provided inaccurate information about the proper place of filing but also concealed a material fact from claimants.

Carl Dresselhaus et al., 128 IBLA 26 (Nov. 16, 1993)

In accordance with 43 CFR 3833.1-3, annual filings for mining claims must be accompanied by a nonrefundable service charge of \$5.00 for each claim. Annual filings received by BLM on or after Jan. 1, 1991, which are not accompanied by the proper service charges are, according to 43 CFR 3833.1-4(b), not to be accepted and are to be returned to the claimant/owner without further action. Thus, there can be no timely annual filing without the accompanying service charge and if the filing deadline passes without proper payment, the claims may be properly declared abandoned and void.

Where a mining claimant makes a timely filing of a notice of intention to hold during the filing year, but the check accompanying the notice, tendered in payment of the service charges, is correctly returned, after the filing deadline, as uncollectible by the bank upon which it is drawn, subsequent payment of the service fee could not cure what had become, because of the dishonored check, an untimely filing, and the claims are properly declared abandoned and void.

N.T.M., Inc., 128 IBLA 77 (Dec. 7, 1993)

MINING CLAIMS--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK
OR NOTICE OF INTENTION TO HOLD--Continued

The failure of the owner of a millsite to file an annual notice of intention to hold the millsite is a curable defect and before BLM declares a millsite abandoned and void for failure to make such a filing, it must provide the owner notice and an opportunity to cure the defect.

Where BLM declares a millsite abandoned and void following a failure by the owner of the millsite to respond to a notice of an annual filing deficiency, and later vacates that decision, concluding that the annual filing had been made, it may not subsequently retroactively reinstate the abandoned and void decision. Notice and an opportunity to cure must be given, and, if no filing is made in response thereto, a new decision must be issued. The effective date of abandonment will run from the date of that new decision.

Libra Mining & Mineral Corp., Floyd Robertson, 128 IBLA 84 (Dec. 10, 1993)

RECORDATION OF CERTIFICATE OR NOTICE OF LOCATION

In light of the adoption of sec. 314(b) of FLPMA, 43 U.S.C. § 1744(b) (1988), the provisions of 30 U.S.C. § 38 (1988), may not be used to establish rights under the mining laws of the U.S. for claims which have not been duly recorded with BLM under sec. 314(b).

Robert L. Mendenhall et al., 127 IBLA 73 (July 20, 1993)

MINING CLAIMS--Continued

RECORDATION OF CERTIFICATE OR NOTICE OF LOCATION--Continue

Placer mining claimants who rely on the provisions of 30 U.S.C. § 38 (1988), to prove location and posting of a mining claim at a time when the land embraced by the location was open to location must comply with the recordation requirements of sec. 314 of FLPMA, 43 U.S.C. § 1744 (1988). Where such a claim has not been recorded, it is a nullity.

Gary Hoefler et al., 127 IBLA 211 (Sept. 14, 1993)

RELOCATION

A placer mining claim was properly declared null and void because it was located on land withdrawn from mining when the claimants failed to show that they had an unbroken chain of title to locators of a claim located prior to withdrawal.

Gary Hoefler et al., 127 IBLA 211 (Sept. 14, 1993)

SURFACE USES

Sec. 4(a) of the Surface Resources Act, 30 U.S.C. § 612(a) (1988), bars use of an unpatented mining claim for any purpose other than prospecting, mining, or processing operations and uses "reasonably incident thereto." Residential occupancy may be reasonably incident to mining during the conduct of operations where required to provide feasible access to remote claims and/or to provide security for equipment and material at times when operations are ongoing. These needs are obviated, however, and residential occupancy may not be reasonably incident where the claimant owns fee lands contiguous with the claim which both provide

MINING CLAIMS--Continued

SURFACE USES--Continued

and control vehicular access to the claim and from which claimant operates a tourist shop.

Storage on an unpatented mining claim of numerous inoperable (junk) automobiles and trucks is not reasonably incidental to mining even though some cannibalized parts from those vehicles may potentially have utility. Similarly, storage on the claim of more dump trucks than the record establishes can reasonably be used in claimant's mining operation is not reasonably incidental to mining.

Occupancy of an unpatented mining claim is properly regulated to bar any unnecessary and undue degradation of the public lands as set forth in sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988). The accumulation of an excessive quantity of parts and materials stored in a disorganized manner on the surface of an unpatented mining claim causing a surface disturbance greater than would normally result when mining is performed by a prudent operator in usual, customary, and proficient operations of similar character gives rise to unnecessary and undue degradation of the public lands.

The conduct of operations on an unpatented mining claim under an approved plan of operations may be conditioned upon provision of a bond adequate to cover the costs of reasonable stabilization and reclamation of disturbed areas. However, the basis for establishing the amount of the bond must be clear from the record.

United States v. Lee Jesse Peterson, 125 IBLA 72
(Jan. 6, 1993)

A determination by an authorized officer that dredging operations capable of moving over 2,400 yards of earth annually within the meaning of 43 CFR 3809.0-5 from the Merced River did not constitute "casual use"

MINING CLAIMS--Continued

SURFACE USES--Continued

was not overcome by an allegation that less than 5 acres of land would be disturbed by such activity.

A reclamation bond was properly required for operations conducted within a wild and scenic river study area pursuant to a plan of operations. 43 CFR 3809.1-9(b).

Lloyd L. Jones, 125 IBLA 94 (Jan. 8, 1993)

Because BLM failed to show that a mining claim was not used or occupied for purposes reasonably incident to mining, it was proper to find that the Government had not demonstrated any impermissible use contrary to provision of 30 U.S.C. § 612(a) (1988), and contest proceedings against the claim were properly dismissed as a result.

United States v. William Doherty, 125 IBLA 296 (Mar. 16, 1993)

When a mining claim is located partially within a WSA, the regulations in 43 CFR Part 3802 apply, and BLM may properly issue a notice of noncompliance requiring a mining claimant to remove unauthorized structures for a WSA, reclaim disturbed lands, and submit a plan of operations and reclamation bond.

Paul M. Shock, 126 IBLA 232 (May 27, 1993)

A road constructed to provide motor vehicle access to a mining claim located in a WSA without first obtaining an approved plan of operations permitting such activity pursuant to provision of 43 CFR 3802.1-1(a) was properly required to be reclaimed.

Lloyd L. Jones, 127 IBLA 270 (Oct. 1, 1993)

MINING CLAIMS--Continued

WITHDRAWN LAND

BLM properly declared placer mining claims partially null and void ab initio that included land which, at the time of location, was subject to a license for a power project under a powersite withdrawal and was therefore closed to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955, as amended, 30 U.S.C. § 621(a) (1988).

Bob & Kayla Alejandre, 125 IBLA 104 (Jan. 12, 1993)

A mining claim located upon lands withdrawn from mineral entry is properly declared null and void.

Where lands are withdrawn from location under the mining law, "subject to valid existing rights," the withdrawal attaches, as of the date of the withdrawal, to all land described by the withdrawal, including the lands covered by unpatented mining claims. The withdrawal is not effective against the claimant's possessory right, but, if the withdrawal is still in existence at the time the claims are abandoned, the withdrawal becomes effective, eo instanti, as to the land covered by such claims, and future mining claim locations are precluded.

Cotter Corp., 127 IBLA 18 (July 13, 1993)

Mining claims located on lands closed to mineral entry are null and void ab initio. Because such claims create no property rights, no rights were infringed when BLM found three claims located on lands closed to mineral entry to be null and void.

Barbara J. Cole, 127 IBLA 120 (Aug. 18, 1993)

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

A placer mining claim was properly declared null and void because it was located on land withdrawn from mining when the claimants failed to show that they had an unbroken chain of title to locators of a claim located prior to withdrawal.

Gary Hoeftler et al., 127 IBLA 211 (Sept. 14, 1993)

Mining claims located on land segregated from appropriation under the mining law by a proposed classification decision made pursuant to 43 CFR 2741.4(h) (1985) are null and void ab initio.

Edgar Sebastian Roberts, 127 IBLA 217 (Sept. 21, 1993)

MINING CLAIMS RIGHTS RESTORATION ACT

BLM properly declared placer mining claims partially null and void ab initio that included land which, at the time of location, was subject to a license for a power project under a powersite withdrawal and was therefore closed to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955, as amended, 30 U.S.C. § 621(a) (1988).

Bob & Kayla Alejandre, 125 IBLA 104 (Jan. 12, 1993)

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969
(See also Environmental Policy Act)

GENERALLY

A protest against an exchange of public and private land was properly denied when it was not shown that the proposal was contrary to valuation requirements imposed by FLPMA sec. 206 and applicable regulations, or that it violated operative land-use plans, or that the exchange was contrary to the public interest. The fact that the exchange resolved a trespass did not establish that it was contrary to public policy.

Brent Hansen et al., 128 IBLA 17 (Nov. 4, 1993)

ENVIRONMENTAL STATEMENTS

A BLM decision to issue a right-of-way grant for an irrigation ditch and associated structures will be affirmed on appeal when based on a reasoned analysis of all relevant factors, including the threat to the human environment from potential breaches of the ditch and to the rights of downstream water users from the diversion of water, and provided the decision was made with due regard for the public interest and sufficient reasons for disturbing the decision have not been shown.

Daryl Richardson et al., 125 IBLA 132 (Jan. 15, 1993)

The general standard upon NEPA review of a BLM decision based on a FONSI for the proposed action is whether the record establishes that BLM took a "hard look" at the environmental consequences of the action; identified the relevant areas of environmental concern; made a reasonable finding that the impacts studied are insignificant; and, with respect to any potentially significant impacts, whether the record supports a finding that mitigating measures have reduced the potential impact to insignificance. Where the action is further modified by stipulations designed to mitigate responding to the analysis in the EA, the appeal will be

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

ENVIRONMENTAL STATEMENTS--Continued

reviewed on the whole record including the modifications.

As a general rule, a FONSI for a proposed action may not be predicated solely on monitoring environmental impacts because doubt as to the nature of the impacts ordinarily precludes a rational basis for a FONSI. Where the record discloses an analysis of the impacts of the proposed action and the imposition of stipulations designed to mitigate any potentially significant impacts, use of monitoring to determine the choice of alternate methods of mitigation does not itself compel reversal of a FONSI. However, a FONSI may be set aside and remanded where it appears from the record that the mitigating measures stipulated may be inadequate to mitigate potentially significant impacts.

Nat'l Wildlife Federation et al., 126 IBLA 48 (Apr. 14, 1993)

Where BLM has prepared an EA and FONSI specific to a proposal to drill two exploratory geothermal observation/flow test wells and deepen an existing exploratory test well, and its analysis of possible full-field development is limited by the absence of any development proposal, that assessment is sufficient in scope and a site-specific EIS is not necessary.

Where review of the reasonably foreseeable impacts of geothermal test drilling failed to disclose a potentially significant impact and there was no evidence to the contrary, an EIS was not required.

Sierra Club, Inc., et al., 126 IBLA 142 (May 6, 1993)

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

ENVIRONMENTAL STATEMENTS--Continued

A BLM decision to implement a management plan by closing part of a road on public lands in a recreation area to motor vehicle use in order to promote other recreational activities beyond the closure point will be affirmed where the decision was made after a reasoned analysis of all relevant factors, including the impact of closure on the human environment and alternatives to closure, and where the decision is supported by the record, and there has been no showing of compelling reasons for modification or reversal of the decision.

Larry Griffin, 126 IBLA 304 (June 15, 1993)

A decision approving a right-of-way for an oil and gas pipeline on public lands on the basis of an EA finding no significant impact which is tiered to a programmatic EIS for oil and gas leasing in the area will be affirmed where BLM has considered the cumulative impact of the right-of-way and the foreseeable oil and gas development to be served thereby and the record provides a reasonable basis for the conclusion that there will be no significant impacts other than those addressed in the EIS.

Southern Utah Wilderness Alliance, 127 IBLA 282 (Oct. 7, 1993)

A determination that approval of an application for a permit to drill an exploratory well and the grant of an associated right-of-way will not have a significant impact on the quality of the human environment will be affirmed on appeal where the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging a FONSI has the burden of establishing by a preponderance of the evidence that the finding was based on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

ENVIRONMENTAL STATEMENTS--Continued

material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

Southern Utah Wilderness Alliance et al., 127 IBLA 331
(Oct. 19, 1993) 100 I.D. 370

A determination that approval of an APD to drill a natural gas well will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

Southern Utah Wilderness Alliance et al., 128 IBLA 52
(Dec. 2, 1993)

FINDING OF NO SIGNIFICANT IMPACT

The general standard upon NEPA review of a BLM decision based on a FONSI for the proposed action is whether the record establishes that BLM took a "hard look" at the environmental consequences of the action; identified the relevant areas of environmental concern; made a reasonable finding that the impacts studied are insignificant; and, with respect to any potentially significant impacts, whether the record supports a finding that mitigating measures have reduced the potential impact to insignificance. Where the action is further modified by stipulations designed to mitigate responding to the analysis in the EA, the appeal will be

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

FINDING OF NO SIGNIFICANT IMPACT--Continued

reviewed on the whole record including the modifications.

As a general rule, a FONSI for a proposed action may not be predicated solely on monitoring environmental impacts because doubt as to the nature of the impacts ordinarily precludes a rational basis for a FONSI. Where the record discloses an analysis of the impacts of the proposed action and the imposition of stipulations designed to mitigate any potentially significant impacts, use of monitoring to determine the choice of alternate methods of mitigation does not itself compel reversal of a FONSI. However, a FONSI may be set aside and remanded where it appears from the record that the mitigating measures stipulated may be inadequate to mitigate potentially significant impacts.

Nat'l Wildlife Federation et al., 126 IBLA 48 (Apr. 14, 1993)

Where review of the reasonably foreseeable impacts of geothermal test drilling failed to disclose a potentially significant impact and there was no evidence to the contrary, an EIS was not required.

Sierra Club, Inc., et al., 126 IBLA 142 (May 6, 1993)

A decision approving a right-of-way for an oil and gas pipeline on public lands on the basis of an EA finding no significant impact which is tiered to a programmatic EIS for oil and gas leasing in the area will be affirmed where BLM has considered the cumulative impact of the right-of-way and the foreseeable oil and gas development to be served thereby and the record provides a reasonable basis for the conclusion that

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

FINDING OF NO SIGNIFICANT IMPACT--Continued

there will be no significant impacts other than those addressed in the EIS.

Southern Utah Wilderness Alliance, 127 IBLA 282 (Oct. 7, 1993)

A determination that approval of an application for a permit to drill an exploratory well and the grant of an associated right-of-way will not have a significant impact on the quality of the human environment will be affirmed on appeal where the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging a FONSI has the burden of establishing by a preponderance of the evidence that the finding was based on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

Southern Utah Wilderness Alliance et al., 127 IBLA 331 (Oct. 19, 1993) 100 I.D. 370

Although an appellant bears the burden of demonstrating error where BLM has determined that a proposed action is not likely to affect a threatened or endangered species, the record on appeal must support BLM's action, and where BLM concludes that the drilling of a natural gas well will not affect the bald eagle because no active eyries or nests were located during the survey of the area, but the record fails to show that searches for bald eagles were conducted in the winter and early spring when bald eagles are known to inhabit the area,

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

FINDING OF NO SIGNIFICANT IMPACT--Continued

BLM's determination will be set aside and the case remanded.

Where, in response to a challenge to approval of an APD to drill a natural gas well, BLM states that no special status plant species, including threatened and endangered plants, were found during a survey of the proposed project area, such a determination must be supported by the record. When the record on appeal contains no evidence of who conducted the survey, any field report, or any description of the methodology employed in making the determination, that determination will be set aside and the case remanded.

A determination by BLM that approval of an APD to drill a natural gas well will not eliminate a river from eligibility for potential inclusion within the National Wild and Scenic River System, pursuant to sec. 5(d) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1276(d) (1988), is supported by the record where there is no evidence in the record that drilling the well in question would adversely affect all the river's outstandingly remarkable values so as to render it ineligible for consideration.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

NATIONAL HISTORIC PRESERVATION ACT

GENERALLY

Sec. 14(h)(1) of ANCSA, 43 U.S.C. § 1613(h)(1) (1988), provides the Secretary may withdraw and convey fee title to existing cemetery sites and historical places to the appropriate regional corporation. If a

NATIONAL HISTORIC PRESERVATION ACT--Continued

GENERALLY--Continued

regional corporation files an application under sec. 14(h)(1), the Secretary may give favorable consideration to the application provided that the Secretary determines that the criteria in the regulations are met. 43 CFR 2653.5(a). For a historical place, this means that it must be a distinguishable tract of land or area where a significant Native historical event occurred or which was subject to sustained Native historical activity.

When the evidence of record about a potential historical place is inconclusive, but the evidence offers sufficient indications of possible sustained Native historical activity, the rejection of an application for a historical place may be set aside and the case remanded for further investigation.

Sealaska Corp., 126 IBLA 383 (July 6, 1993)

Sec. 14(h)(1) of ANSCA, 43 U.S.C. § 1613(h)(1) (1988), provides the Secretary may withdraw and convey fee title to existing cemetery sites and historical places to the appropriate regional corporation. If a regional corporation files an application under sec. 14(h)(1), the Secretary may give favorable consideration to the application provided that the Secretary determines that the criteria in the regulations are met. 43 CFR 2653.5(a). For a historical place, this means that it must be a distinguishable tract of land or area where a significant Native historical event occurred or which was subject to sustained Native historical activity.

BLM properly rejects a selection application for a historical place under sec. 14(h)(1) of ANSCA when the record fails to establish that the site has historic significance for Native history or culture and the site does not meet the criteria set forth at 43 CFR 2653.5.

Sealaska Corp., 127 IBLA 22 (July 15, 1993)

NATIONAL HISTORIC PRESERVATION ACT--Continued

GENERALLY--Continued

Sec. 14(h)(1) of ANSCA, 43 U.S.C. § 1613(h)(1) (1988), authorizes the Secretary of the Interior to withdraw and convey existing historical places and cemetery sites to the appropriate regional corporation. BLM properly grants an application for a historical place when the record establishes that the site is a distinguishable tract of land or area upon which occurred a significant Native historical event, which is importantly associated with Native historical cultural events or persons, and meets the criteria set forth at 43 CFR 2653.5.

Sealaska Corp., 127 IBLA 40 (July 15, 1993)

Sec. 14(h)(1) of ANSCA, 43 U.S.C. § 1613(h)(1) (1988), authorizes the Secretary of the Interior to withdraw and convey existing historical places and cemetery sites to the appropriate regional corporation. BLM properly rejects a selection application for a historical place when the site does not meet the criteria set forth at 43 CFR 2653.5.

Sealaska Corp., 127 IBLA 59 (July 20, 1993)

APPLICABILITY

The Federal grant for a pipeline right-of-way requires BLM to comply with sec. 106 of the National Historic Preservation Act, 16 U.S.C. § 470f (1988), on both Federal and non-Federal lands involved in the project.

Central Valley Electric Cooperative, Inc., 128 IBLA 126 (Dec. 22, 1993)

NATIONAL PARK SERVICE

GENERALLY

The Board will apply the doctrine of estoppel in reversing a 1991 decision of BLM declaring mining claims situated in the Death Valley National Monument abandoned and void for failure to file a notice of intent to hold the claims in 1979, where confusion existed regarding recordation and filing requirements under the Mining in the Parks Act and FLPMA and the claimants inquired of BLM in 1979 whether they were required to make additional filings for their claims during 1979, and in response BLM not only provided inaccurate information about the proper place of filing but also concealed a material fact from claimants.

Carl Dresselhaus et al., 128 IBLA 26 (Nov. 16, 1993)

NAVIGABLE WATERS

In sec. 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a) (1988), Congress codified its power to reserve tideland from a state's equal footing entitlement when a state enters the Union by specifically excluding from operation of that Act "all lands expressly retained by or ceded to the United States when the State entered the Union * * * and any rights the United States has in lands presently and actually occupied by the United States under claim of right."

The Supreme Court has articulated a two-pronged test to determine whether a Federal reservation of public land defeats a state's equal footing entitlement: (1) that Congress clearly intended to include land beneath navigable waters (or tideland) within the reservation and (2) affirmatively intended to defeat future state title to such land.

The reservation of the power of exclusive legislation in sec. 11(b) of the Alaska Statehood Act is expressly predicated on the fact of continued Federal ownership of parcels held for Coast Guard purposes, and

NAVIGABLE WATERS--Continued

Congress intended to retain ownership over tidelands reserved for lighthouse purposes by defeating the State's equal footing entitlement.

State of Alaska, 127 IBLA 317 (Oct. 13, 1993)

OFFICE OF HEARINGS AND APPEALS

(See also Director, Office of Hearings & Appeals)

Although OHA does not have authority to review the merits of biological opinions issued by the U.S. Fish & Wildlife Service under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), it has jurisdiction over an appeal from the rejection by BLM of an application for a right-of-way on the grounds that the right-of-way would destroy a Category 1 candidate species of plant and its habitat.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative

OFFICE OF HEARINGS AND APPEALS--Continued

review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

OHA does not have authority to review the merits of biological opinions issued by the U.S. FWS under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988); however, an appellant's arguments concerning consistency with a biological opinion would normally be subject to review.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

OFFICERS AND EMPLOYEES

(See also Federal Employees & Officers)

Although OHA does not have authority to review the merits of biological opinions issued by the U.S. Fish & Wildlife Service under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), it has jurisdiction over an appeal from the rejection by BLM of an application for a right-of-way on the grounds that the right-of-way would destroy a Category 1 candidate species of plant and its habitat.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

OIL AND GAS LEASES

(See also Mineral Leasing Act, Outer Continental Shelf Lands Act)

GENERALLY

Under the provisions of 43 CFR 3101.7-3, a third-party objecting to issuance of an oil and gas lease on land within the National Forest System, pursuant to the consent of the FS, has standing to appeal to the Interior Board of Land Appeals. However, to the extent that the third-party raises objections to the conformity of actions undertaken by the FS with respect to its own internal operating procedures or with laws solely applicable to the FS, the Board will not review such contentions where the FS has provided its own appeal system for the resolution of such issues.

Colorado Environmental Coalition, 125 IBLA 210 (Feb. 5, 1993)

The provisions of sec. 1323(b) of ANILCA, 16 U.S.C. § 3210(b) (1988), do not apply with respect to access to a Federal oil and gas lease since the leasehold estate does not constitute "nonfederally owned land" within the meaning of the statute.

Issuance of a Federal oil and gas lease carries with it neither an express nor implied right of access to the leasehold. Thus, where a pre-FLPMA lease is surrounded by lands within a WSA, there is no valid existing right, within the meaning of sec. 701(h) of FLPMA, to obtain access to the lease boundaries across Federal land and, in the absence of grandfathered uses, access may not be granted if it would violate the nonimpairment standard mandated by sec. 603(c), 43 U.S.C. § 1782(c) (1988).

Southern Utah Wilderness Alliance et al., 127 IBLA 331 (Oct. 19, 1993) 100 I.D. 370

OIL AND GAS LEASES--Continued

ACQUIRED LANDS LEASES

Under sec. 3 of the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 352 (1988), the Secretary of the Interior lacks authority to issue an oil and gas lease over the objection of the agency having jurisdiction of the acquired land.

Blue Ridge Oil & Gas Exploration, Inc., 127 IBLA 279 (Oct. 5, 1993)

APPLICATIONS

Generally

A defect in an noncompetitive oil and gas lease offer may be cured prior to rejection, with priority as of the date of perfection of the offer. However, after BLM has rejected an offer because it violates the 6-mile square rule, no curative submissions will be accepted; a new offer is required to establish priority.

Lonetree Energy, Inc., 127 IBLA 70 (July 20, 1993)

Under sec. 3 of the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 352 (1988), the Secretary of the Interior lacks authority to issue an oil and gas lease over the objection of the agency having jurisdiction of the acquired land.

Blue Ridge Oil & Gas Exploration, Inc., 127 IBLA 279 (Oct. 5, 1993)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

Land included within a WSA are not subject to leasing pursuant to the MLA. An oil and gas lease offer filed for lands which are not subject to leasing by reason of inclusion in a WSA is properly rejected without suspending adjudication of the offer pending the ultimate determination whether the lands will be designated as wilderness.

Richard D. Sawyer, 127 IBLA 392 (Oct. 29, 1993)

6-mile Square Rule

BLM properly rejects a noncompetitive oil and gas lease offer which does not comply with the requirements of 43 CFR 3110.3-3(b) that lands in an offer be entirely within an area of 6 miles square or within an area not exceeding six surveyed sections in length or width measured in cardinal directions.

A defect in an noncompetitive oil and gas lease offer may be cured prior to rejection, with priority as of the date of perfection of the offer. However, after BLM has rejected an offer because it violates the 6-mile square rule, no curative submissions will be accepted; a new offer is required to establish priority.

Lonetree Energy, Inc., 127 IBLA 70 (July 20, 1993)

CIVIL ASSESSMENTS AND PENALTIES

Under 43 CFR 3163.1(a)(2) BLM may properly assess an oil and gas operator \$250 for failure to comply timely with a notice of INC directing the operator to

OIL AND GAS LEASES--Continued

CIVIL ASSESSMENTS AND PENALTIES--Continued

paint production equipment and facilities, as previously required as a condition of approval of a sundry notice.

Jack J. Grynberg, 125 IBLA 259 (Feb. 16, 1993)

Departmental regulation 30 CFR 216.408(a) calls for an assessment of an amount not to exceed \$10 per day for each report not received by MMS by the designated due date. Consistent with the longstanding practice of the DOI in public land matters, the postmark date is not the date of receipt, and a document is deemed to have been filed when actually received.

For reporting under MMS' Production Accounting and Auditing System, a report is defined as each line of production information required on the applicable form.

McMurry Oil Co., 126 IBLA 278 (June 4, 1993)

An assessment may be levied pursuant to 43 CFR 3163.1(a) for failure to comply with a written order or instruction of the authorized officer within the time stated for abatement or compliance. Such an assessment is not a penalty or fine, but is in the nature of liquidated damages to cover loss or damage incurred by the lessor as a result of the specified incident of non-compliance. For a major violation, \$500 per day for each day nonabatement continues may be assessed.

A decision to assess \$500 for a major violation is a judgmental decision by agency personnel who have special authority to make such decisions. The Board normally accords deference to such BLM decisions when supported by substantial evidence. However, an appellant may overcome such a decision by a preponderance of the evidence.

Petro-X Corp., 127 IBLA 111 (Aug. 12, 1993)

OIL AND GAS LEASES--Continued

CIVIL ASSESSMENTS AND PENALTIES--Continued

Failure of the operator to appeal assessment decisions for incidents of noncompliance issued for violations of the oil and gas operations regulations renders those decisions and the findings contained therein final for the Department and precludes the operator from challenging the merits of the violations or the amounts assessed in a subsequent appeal of a decision demanding payment.

A statute establishing time limitations for commencement of judicial actions for damages on behalf of the U.S. does not limit administrative proceedings within the DOI to recover indebtedness from an oil and gas operator.

CCCo., 127 IBLA 291 (Oct. 7, 1993)

COMPENSATORY ROYALTY

Compensatory royalties accrue upon the passage of a reasonable time following the date the lessee knew or should have known that drainage was occurring. In a common lessee context, the lessee who drills the offending well is in the best position to know that drainage is occurring. In such case BLM need not assume the initial burden of showing that the lessee knew or that a reasonably prudent operator should have known that drainage was occurring, as the common lessee is presumed to have knowledge of the drainage upon first production from its offending well. This presumption is rebuttable by the common lessee, who bears the ultimate burden of persuasion as to the date he had notice that drainage was occurring.

Under the usual statement of the standard for prudent operation, the lessee is not obligated to drill an offset well unless there is a sufficient quantity of

OIL AND GAS LEASES--Continued

COMPENSATORY ROYALTY--Continued

oil or gas to pay a reasonable profit to the lessee over and above the cost of drilling and operating the well. The prudent operator standard applies to situations in which a leased Federal (or Indian) tract is being drained by a well operated by a common lessee. In such cases, BLM has the burden of establishing that the leased Federal (or Indian) tract is being drained by the common lessee's non-Federal well, but need not prove as a part of its cause of action that a protective well would be economic. The burden of producing evidence and the ultimate burden of persuasion on this issue rest with the common lessee.

No breach of a lessee's duty to prevent drainage will occur if the cost of drilling and operating an offset well is greater than the value of the recovered oil and/or gas. However, if a lessee can make a reasonable profit by drilling the well, he has a duty to protect the lease from drainage. The prudent operator test is applied looking to the reasonably anticipatable recovery from the offset well, rather than the oil and/or gas which would be lost if the well were not drilled.

A BLM assessment of compensatory royalty will be overturned on appeal where the lessee establishes by a preponderance of the evidence that little or no drainage occurred from the lease in question and that at all relevant times a prudent operator would not have drilled a well to protect the lease in question from drainage.

Cowden Oil & Gas Properties (L. L. Cowden), 126 IBLA 32 (Apr. 14, 1993)

OIL AND GAS LEASES--Continued

COMPETITIVE LEASES

Under 43 CFR 3120.5-3(a), failure by a successful bidder at a competitive lease sale to pay BLM the balance of the bonus bid due within 10 working days of the sale pursuant to provision of 43 CFR 3120.5-2(c) properly resulted in bid rejection and forfeiture of monies previously tendered. An assertion that payment was timely mailed in order to comply with the regulatory deadline was not sufficient to establish that payment was timely received by BLM.

Morgan Richardson Operating Co., 126 IBLA 332 (June 16, 1993)

CONSENT OF AGENCY

Under the provisions of 43 CFR 3101.7-3, a third-party objecting to issuance of an oil and gas lease on land within the National Forest System, pursuant to the consent of the FS, has standing to appeal to the Interior Board of Land Appeals. However, to the extent that the third-party raises objections to the conformity of actions undertaken by the FS with respect to its own internal operating procedures or with laws solely applicable to the FS, the Board will not review such contentions where the FS has provided its own appeal system for the resolution of such issues.

Where the record establishes that oil and gas leasing recommendations contained in an applicable land and RMP adopted by the FS were subject to revision upon site-specific examination and the FS, pursuant to such an examination, consents to leasing lands formerly designated as unavailable or as available for leasing with NSO restrictions, objections to a decision by BLM to issue leases in reliance on the FS recommendations will be rejected where the party objecting fails to show

OIL AND GAS LEASES--Continued

CONSENT OF AGENCY--Continued

that the FS site-specific analysis was, in any way, flawed.

Colorado Environmental Coalition, 125 IBLA 210 (Feb. 5, 1993)

Under sec. 3 of the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 352 (1988), the Secretary of the Interior lacks authority to issue an oil and gas lease over the objection of the agency having jurisdiction of the acquired land.

Blue Ridge Oil & Gas Exploration, Inc., 127 IBLA 279 (Oct. 5, 1993)

DRAINAGE

Compensatory royalties accrue upon the passage of a reasonable time following the date the lessee knew or should have known that drainage was occurring. In a common lessee context, the lessee who drills the offending well is in the best position to know that drainage is occurring. In such case BLM need not assume the initial burden of showing that the lessee knew or that a reasonably prudent operator should have known that drainage was occurring, as the common lessee is presumed to have knowledge of the drainage upon first production from its offending well. This presumption is rebuttable by the common lessee, who bears the ultimate burden of persuasion as to the date he had notice that drainage was occurring.

Under the usual statement of the standard for prudent operation, the lessee is not obligated to drill an offset well unless there is a sufficient quantity of

OIL AND GAS LEASES--Continued

DRAINAGE--Continued

oil or gas to pay a reasonable profit to the lessee over and above the cost of drilling and operating the well. The prudent operator standard applies to situations in which a leased Federal (or Indian) tract is being drained by a well operated by a common lessee. In such cases, BLM has the burden of establishing that the leased Federal (or Indian) tract is being drained by the common lessee's non-Federal well, but need not prove as a part of its cause of action that a protective well would be economic. The burden of producing evidence and the ultimate burden of persuasion on this issue rest with the common lessee.

No breach of a lessee's duty to prevent drainage will occur if the cost of drilling and operating an offset well is greater than the value of the recovered oil and/or gas. However, if a lessee can make a reasonable profit by drilling the well, he has a duty to protect the lease from drainage. The prudent operator test is applied looking to the reasonably anticipatable recovery from the offset well, rather than the oil and/or gas which would be lost if the well were not drilled.

A BLM assessment of compensatory royalty will be overturned on appeal where the lessee establishes by a preponderance of the evidence that little or no drainage occurred from the lease in question and that at all relevant times a prudent operator would not have drilled a well to protect the lease in question from drainage.

Cowden Oil & Gas Properties (L. L. Cowden), 126 IBLA 32 (Apr. 14, 1993)

OIL AND GAS LEASES--Continued

DRILLING

When, on appeal from a decision on State Director review affirming a Decision Record and FONSI approving an APD to drill a natural gas well, the appellant seeks to raise additional issues which it did not present for State Director review and which were not addressed in the decision, the Board need not adjudicate such issues, but may confine its review to matters addressed in that decision.

Although an appellant bears the burden of demonstrating error where BLM has determined that a proposed action is not likely to affect a threatened or endangered species, the record on appeal must support BLM's action, and where BLM concludes that the drilling of a natural gas well will not affect the bald eagle because no active eyries or nests were located during the survey of the area, but the record fails to show that searches for bald eagles were conducted in the winter and early spring when bald eagles are known to inhabit the area, BLM's determination will be set aside and the case remanded.

Where, in response to a challenge to approval of an APD to drill a natural gas well, BLM states that no special status plant species, including threatened and endangered plants, were found during a survey of the proposed project area, such a determination must be supported by the record. When the record on appeal contains no evidence of who conducted the survey, any field report, or any description of the methodology employed in making the determination, that determination will be set aside and the case remanded.

A determination by BLM that approval of an APD to drill a natural gas well will not eliminate a river from eligibility for potential inclusion within the National Wild and Scenic River System, pursuant to sec. 5(d) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1276(d) (1988), is supported by the record where there is no evidence in the record that drilling the well in

OIL AND GAS LEASES--Continued

DRILLING--Continued

question would adversely affect all the river's outstandingly remarkable values so as to render it ineligible for consideration.

A determination that approval of an APD to drill a natural gas well will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

EXPIRATION

A lease issued under the IMLA, 25 U.S.C. §§ 396a-396f (1988), does not expire because of a temporary shut-in caused by a mechanical breakdown or accident, as long as the shut-in does not continue beyond the time reasonably necessary to make repairs and resume production.

Citation Oilfield Supply & Leasing, Ltd. & Murphy Oil U.S.A., Inc. v. Acting Billings Area Director, Bureau of Indian Affairs, 23 IBIA 163 (Jan. 28, 1993)

OIL AND GAS LEASES--Continued

EXPIRATION--Continued

When an oil and gas development agreement entered into under the Indian Mineral Development Act, 25 U.S.C. §§ 2101-2108 (1988), provides that it remains in effect after its initial term as long as oil and/or gas is produced in paying quantities, it expires by its own terms when production in paying quantities ceases.

Jay Magness v. Albuquerque Area Director, Bureau of Indian Affairs, 25 IBIA 65 (Dec. 6, 1993)

FEDERAL ONSHORE OIL AND GAS LEASING REFORM ACT OF 1987

Land included within a WSA are not subject to leasing pursuant to the MLA. An oil and gas lease offer filed for lands which are not subject to leasing by reason of inclusion in a WSA is properly rejected without suspending adjudication of the offer pending the ultimate determination whether the lands will be designated as wilderness.

Richard D. Sawyer, 127 IBLA 392 (Oct. 29, 1993)

INCIDENTS OF NONCOMPLIANCE

Under 43 CFR 3163.1(a)(2) BLM may properly assess an oil and gas operator \$250 for failure to comply timely with a notice of INC directing the operator to paint production equipment and facilities, as previously required as a condition of approval of a sundry notice.

Jack J. Grynberg, 125 IBLA 259 (Feb. 16, 1993)

OIL AND GAS LEASES--Continued

INCIDENTS OF NONCOMPLIANCE--Continued

Where an oil and gas operator is cited by BLM with violations of the oil and gas operations regulations and Onshore Oil and Gas Orders, the operator may not escape liability for those infractions by asserting that BLM has failed to cite other operators with allegedly more serious violations.

When an oil and gas lease operator challenges incidents of noncompliance that have been removed from the record by the decision under appeal and the operator does not contest the fact of violation, the appeal will be dismissed because there is no effective relief that can be afforded to the operator by the Board.

An incident of noncompliance is properly issued where the site facility diagram does not include all the information required by 43 CFR 3162.7-5(d)(3), including the current seal placements, valve positions, and the prevailing security plan and its location.

Failure to seal a sales valve during the production phase is a major violation. The production phase is defined in 43 CFR 3162.7-5(a) as that period of time or mode of operation during which crude oil is delivered directly to or through production vessels to the storage facilities and includes all operations at the facility other than those defined by the sales phase. Where production from an oil well on a Federal lease is present in a storage tank on the lease and it is not being removed from the tank for sales, transportation, or other purposes, the operation must be construed to be in the production phase.

An assessment may be levied pursuant to 43 CFR 3163.1(a) for failure to comply with a written order or instruction of the authorized officer within the time stated for abatement or compliance. Such an assessment is not a penalty or fine, but is in the nature of liquidated damages to cover loss or damage incurred by

OIL AND GAS LEASES--Continued

INCIDENTS OF NONCOMPLIANCE--Continued

the lessor as a result of the specified incident of non-compliance. For a major violation, \$500 per day for each day nonabatement continues may be assessed.

A decision to assess \$500 for a major violation is a judgmental decision by agency personnel who have special authority to make such decisions. The Board normally accords deference to such BLM decisions when supported by substantial evidence. However, an appellant may overcome such a decision by a preponderance of the evidence.

Petro-X Corp., 127 IBLA 111 (Aug. 12, 1993)

Failure of the operator to appeal assessment decisions for incidents of noncompliance issued for violations of the oil and gas operations regulations renders those decisions and the findings contained therein final for the Department and precludes the operator from challenging the merits of the violations or the amounts assessed in a subsequent appeal of a decision demanding payment.

CCCo., 127 IBLA 291 (Oct. 7, 1993)

LANDS SUBJECT TO

Michigan law determined when title to the oil and gas estate passed to the U.S. under a grant retaining mineral title "until May 16, 1985." The conclusion that an oil and gas lease offer for acquired lands was prematurely filed on May 16, 1985, must therefore be reversed where Michigan case law indicates that ambiguity is properly construed against a grantor if it appears as a limitation on the grant.

Wilfred Plomis, 126 IBLA 68 (Apr. 14, 1993)

OIL AND GAS LEASES--Continued

LANDS SUBJECT TO--Continued

Land included within a WSA are not subject to leasing pursuant to the MLA. An oil and gas lease offer filed for lands which are not subject to leasing by reason of inclusion in a WSA is properly rejected without suspending adjudication of the offer pending the ultimate determination whether the lands will be designated as wilderness.

Richard D. Sawyer, 127 IBLA 392 (Oct. 29, 1993)

NONCOMPETITIVE LEASES

Michigan law determined when title to the oil and gas estate passed to the U.S. under a grant retaining mineral title "until May 16, 1985." The conclusion that an oil and gas lease offer for acquired lands was prematurely filed on May 16, 1985, must therefore be reversed where Michigan case law indicates that ambiguity is properly construed against a grantor if it appears as a limitation on the grant.

Wilfred Plomis, 126 IBLA 68 (Apr. 14, 1993)

A defect in an noncompetitive oil and gas lease offer may be cured prior to rejection, with priority as of the date of perfection of the offer. However, after BLM has rejected an offer because it violates the 6-mile square rule, no curative submissions will be accepted; a new offer is required to establish priority.

Lonetree Energy, Inc., 127 IBLA 70 (July 20, 1993)

OIL AND GAS LEASES--Continued

OFFERS TO LEASE

Land included within a WSA are not subject to leasing pursuant to the MLA. An oil and gas lease offer filed for lands which are not subject to leasing by reason of inclusion in a WSA is properly rejected without suspending adjudication of the offer pending the ultimate determination whether the lands will be designated as wilderness.

Richard D. Sawyer, 127 IBLA 392 (Oct. 29, 1993)

PRODUCTION

Where applicable statutes and regulations require that the MMS value wet gas production from a Federal lease on the greater of the gross proceeds accruing to the lessee from the sale thereof or the aggregate value determined by the Secretary of all the commodities, including residue gas, a valuation determination that royalty shall be paid on the value of one-third of all liquids extracted from the gas and 100 percent of the residue gas is properly upheld by the Director, MMS.

Kerr-McGee Corp., 125 IBLA 279 (Feb. 25, 1993)

REINSTATEMENT

BLM properly denies a petition for class I reinstatement of an oil and gas lease which terminated automatically by operation of law for failure to pay the rental on or before the lease anniversary date where the lessee, having paid the full rental within 20 days following the anniversary date, fails to establish that the failure to timely pay the rental was justified or not due to a lack of reasonable diligence.

Gilbert & Bonnie Sockwell, 125 IBLA 150 (Jan. 21, 1993)

OIL AND GAS LEASES--Continued

REINSTATEMENT--Continued

Under the provisions of the Act of Nov. 15, 1990, 104 Stat. 2802, an oil and gas lease issued under sec. 14 of the MLA, 30 U.S.C. § 223 (1988), which is automatically terminated for the failure to timely pay the annual rental, may be reinstated under either 30 U.S.C. § 188(c) (1988), or 30 U.S.C. § 188(d) (1988).

Carol B. Rodgers, G. Leslie Buchner, 126 IBLA 117
(Apr. 29, 1993)

RENTALS

BLM properly holds an oil and gas lease issued pursuant to sec. 14 of the MLA, as amended, 30 U.S.C. § 223 (1988), on which there was no well capable of producing oil or gas in paying quantities, to have automatically terminated by operation of law where the annual rent was not paid on or before the lease anniversary date, even if the Department had earlier stated that it would apply the same rental erroneously tendered for another lease account, but had instead refunded the money prior to the anniversary date.

Under the provisions of the Act of Nov. 15, 1990, 104 Stat. 2802, an oil and gas lease issued under sec. 14 of the MLA, 30 U.S.C. § 223 (1988), which is automatically terminated for the failure to timely pay the annual rental, may be reinstated under either 30 U.S.C. § 188(c) (1988), or 30 U.S.C. § 188(d) (1988).

Carol B. Rodgers, G. Leslie Buchner, 126 IBLA 117
(Apr. 29, 1993)

OIL AND GAS LEASES--Continued

ROYALTIES

Generally

Where applicable statutes and regulations require that the MMS value wet gas production from a Federal lease on the greater of the gross proceeds accruing to the lessee from the sale thereof or the aggregate value determined by the Secretary of all the commodities, including residue gas, a valuation determination that royalty shall be paid on the value of one-third of all liquids extracted from the gas and 100 percent of the residue gas is properly upheld by the Director, MMS.

Kerr-McGee Corp., 125 IBLA 279 (Feb. 25, 1993)

Under 30 CFR 206.105(c), wet gas is properly valued using the aggregate value of all commodities, including residue gas. That is, MMS may properly determine the value to be the aggregate of the value of residue gas, NGLP, and sulfur, all of which were commodities obtained from the gas.

Under 30 CFR 206.106, a manufacturing allowance of up to two-thirds the value of entrained hydrocarbon liquids may be taken as a deduction from the royalty basis of those liquids. Thus, a deduction is allowable for costs of manufacture of such substances extracted from the gas produced from the leasehold, but there is a regulatory limit of two-thirds of the value of those substances.

A Federal oil and gas lessee has the duty to put gas produced from the lease in a marketable condition. That duty includes treating the gas to remove hydrogen sulfide, so that costs of such treatment are not deductible. It is irrelevant who performs the treatment or the activities necessary to place the gas in marketable condition, or that title may have passed from the Federal lessee prior to undertaking the activity necessary to place the gas in marketable condition.

Where wet gas was processed into residue gas and liquid hydrocarbons, but only a portion of residue gas

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

was immediately sold, with the remainder being stored because there was not sufficient market demand, the unsold gas is properly valued as of the time it was removed from the leases, as there was a demand for gas and available supply at that time sufficient to accord the gas a fair market value upon which royalty could be calculated. Where MMS valued all of the residue gas, including the portion not immediately sold, at the price of that sold immediately, its valuation will be affirmed in the absence of a showing that MMS did not value the gas giving "due consideration * * * to the highest price paid for a part or for a majority of production of like quality in the same field, * * * to posted prices, and to other relevant matters," as required by 30 CFR 206.105(c).

Where an audit of a Federal oil and gas lease extends through Sept. 1988, a decision by MMS calculating royalty based on regulations that were effective only through Mar. 1, 1988, is properly set aside and the matter remanded for consideration of whether the audit pertaining to this lease should have been terminated on Mar. 1, 1988, or whether amended regulations should have been applied to the balance of the period through Sept. 1988.

Where a lessee strongly suggests that the high percentage of hydrogen sulfide made transportation of the gas unduly expensive, MMS should allow the lessee the opportunity to justify a request that costs of removal of hydrogen sulfide may be deductible as a transportation allowance.

Apache Corp., 127 IBLA 125 (Aug. 24, 1993)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

Where the purchaser of residue gas under a contract for the sale of all the residue gas in field reduces its purchases of that gas but still buys more than 50 percent of the residue gas in the field, MMS may properly value all the residue gas for royalty purposes at the price established in the contract for sale of that gas, even though the gas not taken under the contract is later sold at a lower price.

Ladd Petroleum Corp., 127 IBLA 163 (Aug. 27, 1993)

Regulations issued in 1986 limited an allowance for processing costs incurred by oil and gas royalty payors for gas produced during 1987 to two-thirds of the value of the product. Such lessees were not entitled to the benefit of later promulgated regulations providing a greater production allowance that applied only to production beginning on Mar. 1, 1988.

Exxon Co., U.S.A., 128 IBLA 22 (Nov. 9, 1993)

Interest

Under 30 CFR 218.54, MMS is authorized to assess a late payment interest charge if royalty payments for oil and gas leases are unpaid or underpaid on the date the amounts are due. Under 30 CFR 218.50(a), royalty payments are normally due at the end of the month following the month in which the oil and/or gas is produced and sold, and MMS properly rejects an argument that royalty on additional proceeds resulting from retroactive price adjustments is not due until the lessee receives the additional payment from its purchaser.

Oxy USA Inc., 125 IBLA 308 (Mar. 18, 1993)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Interest--Continued

MMS properly requires the holder of a Federal onshore oil and gas lease to pay interest on late royalty payments made for a royalty obligation that arose prior to the enactment of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §§ 1701-1757 (1988).

Miami Oil Producers, Inc., 125 IBLA 313 (Mar. 23, 1993)

Natural Gas Liquid Products

MMS may properly require a lessee selling unprocessed casinghead gas at the wellhead pursuant to an arm's-length "percentage-of-proceeds" contract to value such gas for royalty purposes at an amount equal to one-third of the value of natural gas liquids plus the full value of residue gas.

Amoco Production, Inc., 126 IBLA 124 (Apr. 30, 1993)

Where applicable regulations require that MMS value wet gas production from a Federal lease on the greater of the gross proceeds accruing to the lessee from the sale thereof or the aggregate value determined by the Secretary of all the commodities, including residue gas, a valuation determination that royalty shall be paid on the value of one-third of all liquids extracted from the gas and 100 percent of the residue gas must be affirmed.

Walter Van Norman, Jr., 126 IBLA 375 (July 1, 1993)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Natural Gas Liquid Products--Continued

Under 30 CFR 206.105(c), wet gas is properly valued using the aggregate value of all commodities, including residue gas. That is, MMS may properly determine the value to be the aggregate of the value of residue gas, NGLP, and sulfur, all of which were commodities obtained from the gas.

Under 30 CFR 206.106, a manufacturing allowance of up to two-thirds the value of entrained hydrocarbon liquids may be taken as a deduction from the royalty basis of those liquids. Thus, a deduction is allowable for costs of manufacture of such substances extracted from the gas produced from the leasehold, but there is a regulatory limit of two-thirds of the value of those substances.

Apache Corp., 127 IBLA 125 (Aug. 24, 1993)

MMS may properly require a royalty payor selling unprocessed wet gas at the wellhead pursuant to arm's-length percentage-of-proceeds contracts to value such gas for royalty purposes at an amount equal to one-third of the value of the liquids extracted from the gas and 100 percent of the value of the residue gas where that amount exceeds the gross proceeds accruing to the royalty payor.

Ladd Petroleum Corp., 127 IBLA 163 (Aug. 27, 1993)

Payments

Where applicable regulations require that MMS value wet gas production from a Federal lease on the greater of the gross proceeds accruing to the lessee from the sale thereof or the aggregate value determined by the Secretary of all the commodities, including residue gas, a valuation determination that royalty shall be paid on the value of

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Payments--Continued

one-third of all liquids extracted from the gas and 100 percent of the residue gas must be affirmed.

Walter Van Norman, Jr., 126 IBLA 375 (July 1, 1993)

The offsetting of royalty overpayments against underpayments from an offshore oil and gas lease may only take place after an official audit and within the royalty account of a single lease. Offsetting between leases is not permitted.

Where a policy to restrict the offset of royalty overpayments against underpayments is the product of adjudication, the notice and comment procedures of 5 U.S.C. § 553 (1988), are not required.

Union Exploration Partners, Ltd., 127 IBLA 220 (Sept. 23, 1993)

Acting under authority provided by sec. 103 of FOGPMA, MMS properly required production of sales contracts and exchange agreements needed to ascertain whether gross proceeds from sales of Federal crude oil exceeded the value reported by the Federal lessee from a transfer between affiliated corporations that was not an arms-length transaction.

Santa Fe Energy Products Co., 127 IBLA 265 (Sept. 28, 1993)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Processing Allowance

The regulations in 25 CFR Part 226 do not authorize a gas lessee to deduct allowances from royalties owing to the Osage Tribe.

ZCA Gas Gathering, Inc. v. Acting Muskogee Area
Director, Bureau of Indian Affairs, 23 IBIA 228
(Mar. 8, 1993)

Under 30 CFR 206.106, a manufacturing allowance of up to two-thirds the value of entrained hydrocarbon liquids may be taken as a deduction from the royalty basis of those liquids. Thus, a deduction is allowable for costs of manufacture of such substances extracted from the gas produced from the leasehold, but there is a regulatory limit of two-thirds of the value of those substances.

A Federal oil and gas lessee has the duty to put gas produced from the lease in a marketable condition. That duty includes treating the gas to remove hydrogen sulfide, so that costs of such treatment are not deductible. It is irrelevant who performs the treatment or the activities necessary to place the gas in marketable condition, or that title may have passed from the Federal lessee prior to undertaking the activity necessary to place the gas in marketable condition.

Apache Corp., 127 IBLA 125 (Aug. 24, 1993)

Regulations issued in 1986 limited an allowance for processing costs incurred by oil and gas royalty payors for gas produced during 1987 to two-thirds of the value of the product. Such lessees were not entitled to the benefit of later promulgated regulations providing a

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Processing Allowance--Continued

greater production allowance that applied only to production beginning on Mar. 1, 1988.

Exxon Co., U.S.A., 128 IBLA 22 (Nov. 9, 1993)

STIPULATIONS

Where the record establishes that oil and gas leasing recommendations contained in an applicable land and RMP adopted by the FS were subject to revision upon site-specific examination and the FS, pursuant to such an examination, consents to leasing lands formerly designated as unavailable or as available for leasing with NSO restrictions, objections to a decision by BLM to issue leases in reliance on the FS recommendations will be rejected where the party objecting fails to show that the FS site-specific analysis was, in any way, flawed.

Colorado Environmental Coalition, 125 IBLA 210 (Feb. 5, 1993)

SUSPENSIONS

The Secretary of the Interior and those authorized to act on his behalf have the discretionary authority to suspend operations and production under any oil or gas lease for conservation purposes, including the prevention of environmental damage. Where the record indicates that an EA prepared for drilling operations on an oil and gas lease located within both a ESA and an area of critical environmental concern failed to consider this option in evaluating the proposal to drill, the decision approving drilling operations will be set aside and the case will be remanded to permit consideration of

OIL AND GAS LEASES--Continued

SUSPENSIONS--Continued

whether, under this discretionary authority, operations under the lease should be suspended.

Southern Utah Wilderness Alliance et al., 127 IBLA 331
(Oct. 19, 1993) 100 I.D. 370

TERMINATION

BLM properly denies a petition for class I reinstatement of an oil and gas lease which terminated automatically by operation of law for failure to pay the rental on or before the lease anniversary date where the lessee, having paid the full rental within 20 days following the anniversary date, fails to establish that the failure to timely pay the rental was justified or not due to a lack of reasonable diligence.

Gilbert & Bonnie Sockwell, 125 IBLA 150 (Jan. 21, 1993)

Where a Federal oil and gas lease is in an extended term owing to production from wells on the lease, where BLM has given notice under 43 CFR 3107.2-2 to the lessee that those wells are no longer capable of production and allows 60 days to rework the wells, drill a new well on the leasehold, or submit justification that the lease is capable of producing in paying quantities, and where no remedial action has been taken, BLM properly issues a decision declaring that the lease has terminated by cessation of production and returns unapproved pending applications for approval of assignments of interests in that lease.

Samuel Gary Jr. & Associates, Inc., 125 IBLA 223
(Feb. 5, 1993)

OIL AND GAS LEASES--Continued

TERMINATION--Continued

BLM properly holds an oil and gas lease issued pursuant to sec. 14 of the MLA, as amended, 30 U.S.C. § 223 (1988), on which there was no well capable of producing oil or gas in paying quantities, to have automatically terminated by operation of law where the annual rent was not paid on or before the lease anniversary date, even if the Department had earlier stated that it would apply the same rental erroneously tendered for another lease account, but had instead refunded the money prior to the anniversary date.

Carol B. Rodgers, G. Leslie Buchner, 126 IBLA 117
(Apr. 29, 1993)

UNITIZATION

While the authorized officer was clearly possessed of the authority under sec. 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1988), to precondition approval of a unitization agreement involving a pre-FLPMA oil and gas lease upon acceptance of the application of the nonimpairment standard to lands within a WSA, where he failed to do so the Board will not retroactively impose this condition on leased lands within a WSA.

Since no express or implied rights of access arise upon issuance of a Federal oil and gas lease, the approval of the committal of a pre-FLPMA lease to a unit plan subsequent to the adoption of sec. 603(c) of FLPMA does not alter the application of the nonimpairment standard in determining whether access to the lease across other lands within the unit may be permitted.

Southern Utah Wilderness Alliance et al., 127 IBLA 331
(Oct. 19, 1993) 100 I.D. 370

OIL AND GAS LEASES--Continued

WELL CAPABLE OF PRODUCTION

Where a Federal oil and gas lease is in an extended term owing to production from wells on the lease, where BLM has given notice under 43 CFR 3107.2-2 to the lessee that those wells are no longer capable of production and allows 60 days to rework the wells, drill a new well on the leasehold, or submit justification that the lease is capable of producing in paying quantities, and where no remedial action has been taken, BLM properly issues a decision declaring that the lease has terminated by cessation of production and returns unapproved pending applications for approval of assignments of interests in that lease.

Samuel Gary Jr. & Associates, Inc., 125 IBLA 223
(Feb. 5, 1993)

OREGON AND CALIFORNIA RAILROAD AND RECONVEYED COOS BAY GRANT LANDS

NONMINERAL ENTRIES AND DISPOSALS

A protest against an exchange of public for private land made pursuant to sec. 206 of FLPMA was properly denied when it was not established, as alleged, that the exchange would violate the Oregon and California Railroad and Reconveyed Coos Bay Grant Lands Act, statutory and regulatory requirements establishing minimum allowable value for exchange lands, or adversely affect local economies directly concerned with the exchange, or contravene the public interest. An allegation that a timber processor would be competitively disadvantaged by an exchange of a timbered tract to another timber company is found to be sufficient to establish standing to appeal from a denial of a protest against the proposed exchange but insufficient to

OREGON AND CALIFORNIA RAILROAD AND RECONVEYED COOS
BAY GRANT LANDS--Continued

NONMINERAL ENTRIES AND DISPOSALS--Continued

establish that the exchange was not in the interest of the United States.

Swanson-Superior Forest Products, Inc., 127 IBLA 379
(Oct. 27, 1993)

PERMITS

Use of a road on Oregon and California lands for hauling logs before a permit is issued is a willful trespass under 43 CFR 2800.0-5(v).

Larry D. Olson, 126 IBLA 229 (May 24, 1993)

RIGHTS-OF-WAY

Use of a road on Oregon and California lands for hauling logs before a permit is issued is a willful trespass under 43 CFR 2800.0-5(v).

Larry D. Olson, 126 IBLA 229 (May 24, 1993)

OUTER CONTINENTAL SHELF LANDS ACT
(See also Oil & Gas Leases)

GENERALLY

When a royalty payor alleged that a request for a refund under sec. 10 of the OCSLA, 43 U.S.C. § 1339 (1988), was timely filed with the proper MMS office, but failed to corroborate timely receipt by MMS of the request by other evidence, MMS properly found that the

OUTER CONTINENTAL SHELF LANDS ACT--Continued

GENERALLY--Continued

agency's datestamp on the refund request proved that it was late.

Chevron U.S.A. Inc., 127 IBLA 96 (July 27, 1993)

REFUNDS

At the time that sec. 10 of the OCSLA, 43 U.S.C. § 1339, was enacted, Congress could not have contemplated that a routinized, automated process later would be established by rule under OCSLA's authority for adjusting transportation and processing allowances for relatively small amounts. Recoupments that result from adjustments to transportation and processing allowances under the procedure prescribed in the regulations are within the intent of Congress in enacting sec. 10, and this category of transactions should not be regarded as subject to sec. 10.

Applicability of Sec. 10 of the Outer Continental Shelf Lands Act, M-36977 (Jan. 15, 1993) 100 I.D. 418

When a royalty payor alleged that a request for a refund under sec. 10 of the OCSLA, 43 U.S.C. § 1339 (1988), was timely filed with the proper MMS office, but failed to corroborate timely receipt by MMS of the request by other evidence, MMS properly found that the agency's datestamp on the refund request proved that it was late.

Chevron U.S.A. Inc., 127 IBLA 96 (July 27, 1993)

OUTER CONTINENTAL SHELF LANDS ACT--Continued

REFUNDS--Continued

The offsetting of royalty overpayments against underpayments from an offshore oil and gas lease may only take place after an official audit and within the royalty account of a single lease. Offsetting between leases is not permitted.

Where a policy to restrict the offset of royalty overpayments against underpayments is the product of adjudication, the notice and comment procedures of 5 U.S.C. § 553 (1988), are not required.

Union Exploration Partners, Ltd., 127 IBLA 220
(Sept. 23, 1993)

Sec. 10(c) of OCSLA, 43 U.S.C. § 1339(a) (1988), authorizes the issuance of refunds for royalty overpayments only where the request for a refund is made within 2 years of the date that the overpayment is made. A subsequent court ruling on the liability of Federal lessees for royalty on take-or-pay proceeds will not extend the statutory time for filing a request for refund.

Sec. 10(a) of OCSLA, 43 U.S.C. § 1339(a) (1988), expressly bars the Department from paying interest on refunds for royalty overpayments.

Amerada Hess Corp., 128 IBLA 94 (Dec. 13, 1993)

PATENTS OF PUBLIC LANDS

CORRECTIONS

To show entitlement under 43 U.S.C. § 1746 (1988), to the extraordinary remedy of correction of a mineral patent, an applicant must show both that there was an error in fact that requires correction and that considerations of equity and justice favor such correction. A purchaser of a tax deed to a mineral patent failed to make a sufficient showing to warrant correction of the patent when the evidence offered to show error in the patent was inconclusive and he failed to show that equity favored granting his application.

Frank L. Lewis, 127 IBLA 307 (Oct. 7, 1993)

RESERVATIONS

Under Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983), gravel is a mineral reserved to the U.S. by sec. 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1988). When an Indian tribe receives title to minerals reserved under this provision, it receives title to the reserved gravel.

Sampsel J. Bitz v. Acting Billings Area Director, Bureau of Indian Affairs, 23 IBIA 286 (Apr. 6, 1993)

POWERSITE LANDS

BLM properly declared placer mining claims partially null and void ab initio that included land which, at the time of location, was subject to a license for a power project under a powersite withdrawal and was therefore closed to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955, as amended, 30 U.S.C. § 621(a) (1988).

Bob & Kayla Alejandre, 125 IBLA 104 (Jan. 12, 1993)

PROPERTY BOARD OF SURVEY

GENERALLY

Interior Department employees are bound by the provisions of the Departmental Manual regardless of a lack of actual notice. A lack of knowledge of a provision in the Departmental Manual making employees liable for Government property loss or damage caused by negligence will not preclude a finding of liability where otherwise supported by the record.

In the Matter of Joseph Hoffman, 10 OHA 40 (June 30, 1993)

ADMINISTRATIVE PROCEDURES

Where no material facts are at issue, a plenary, adversary administrative hearing is unnecessary.

In the Matter of Dennis E. Hutchison, 10 OHA 56 (June 30, 1993)

JURISDICTION

An appeal from a Property Board of Survey decision within the Interior Department finding an employee liable for loss or damage to Government property caused by his negligence is properly reviewed by an Ad Hoc Appeals Board within OHA pursuant to the regulations at 43 CFR 4.700-4.704.

In the Matter of Joseph Hoffman, 10 OHA 40 (June 30, 1993)

PROPERTY BOARD OF SURVEY--Continued

JURISDICTION--Continued

Effective Sept. 23, 1992, appeals of a Board of Survey's finding of simple or gross negligence are decided by an Ad Hoc Board of Appeals in OHA. A motion to dismiss a proposed debt collection and to cancel a hearing for failure to satisfy the provisions of 370 DM 550,10.7J is properly denied where no effort to recover a debt by salary offset has been made by the Department. Only those appeals specifically reserved to the Debt Collection Act, 5 U.S.C. § 5514 (1988), are processed under 370 DM 550.

In the Matter of Marco V. Ricciardi, 10 OHA 78 (June 30, 1993)

NEGLIGENCE

Missing Property

Simple negligence is defined at 410 DM 114-60.812-1 as an act or omission of an employee who fails to exercise the degree of care, precaution, attention, and vigilance necessary to protect the interests of the Government or the failure to exercise that degree of care which a prudent person would exercise under like circumstances.

A finding of negligence is not supported by a record which shows that a pair of binoculars was lost by a BLM soils scientist during field work in thick vegetation, and such binoculars had been looped through a grommet in the employee's vest.

In the Matter of Dennis E. Hutchison, 10 OHA 56 (June 30, 1993)

PROPERTY BOARD OF SURVEY--Continued

NEGLIGENCE--Continued

Missing Property--Continued

Personal Property Release No. 92-07 requires a Board of Survey, in assembling a case record for appeal, to give particular attention to evidence of the standard of conduct found to be breached. A decision finding a law enforcement officer negligent for taking inadequate security measures in storing a revolver, later stolen, will be set aside when the record contains no evidence of the standard found to be breached. A finding of negligence must be supported by logical written determinations.

In the Matter of Thomas F. Wharton, 10 OHA 67 (June 30, 1993)

Motor Vehicle

Under the terms of the Departmental Manual, Interior Department employees may be liable for property loss or damage caused by failure to exercise the degree of care which a prudent person would exercise under like circumstances. In the absence of mitigating factors, the driver of a vehicle who backs into a parked vehicle may be held liable for actual damage limited to the amount of \$200.

In the Matter of Joseph Hoffman, 10 OHA 40 (June 30, 1993)

PROPERTY BOARD OF SURVEY--Continued

NEGLIGENCE--Continued

Motor Vehicle--Continued

An individual who starts the ignition of a pickup truck while standing outside the cab of the vehicle, thereby causing the pickup to lurch backwards and be damaged, is negligent and is properly held liable for such damage, as limited by 410 DM 114-60.812-6(b).

In the Matter of Michael P. Ramirez, 10 OHA 51 (June 30, 1993)

Regulation 410 DM 114-60.812-1(b)(2) defines negligence as an act or omission of an employee who fails to exercise the degree of care, precaution, attention, and vigilance necessary for protecting the interests of the Government or the failure to exercise that degree of care which a prudent person would exercise under like circumstances.

An officer of the U.S. Park Police whose Force vehicle strikes a gate stop post while making a "K" turn onto the road shoulder in an effort to avoid a parked vehicle blocking the Force vehicle will not be found negligent when the officer had checked to see whether such turn could be made and the size and color of the gate stop post and the poor illumination of the area reduced the visibility of such post.

Lawrence J. McNally, 10 OHA 72 (June 30, 1993)

Regulation 410 DM 114-60.812-1(b)(2) defines negligence as an act or omission of an employee who fails to exercise the degree of care, precaution, attention, and vigilance necessary for protecting the interests of the Government or the failure to exercise that degree of care which a prudent person would exercise under like circumstances.

An officer of the U.S. Park Police who backs a motor vehicle into a utility pole will not be found

PROPERTY BOARD OF SURVEY--Continued

NEGLIGENCE--Continued

Motor Vehicle--Continued

negligent where such action occurred in the course of his duties under conditions of darkness, constant rain, lack of illumination, and possible design hazard, and it appears that the officer was exercising reasonable care in his driving when impact with the utility pole occurred.

In the Matter of Marco V. Ricciardi, 10 OHA 78 (June 30, 1993)

PUBLIC LANDS

(See also Accretion, Avulsion, Boundaries, Reliction, Surveys of Public Lands)

ADMINISTRATION

A BLM decision to implement a management plan by closing part of a road on public lands in a recreation area to motor vehicle use in order to promote other recreational activities beyond the closure point will be affirmed where the decision was made after a reasoned analysis of all relevant factors, including the impact of closure on the human environment and alternatives to closure, and where the decision is supported by the record, and there has been no showing of compelling reasons for modification or reversal of the decision.

Larry Griffin, 126 IBLA 304 (June 15, 1993)

PUBLIC LANDS--Continued

CLASSIFICATION

BLM properly rejected a desert land entry application for lands that were classified unsuitable for agricultural development by a final order of the Secretary of the Interior.

Keith P. Gunderson, 127 IBLA 16 (July 12, 1993)

SPECIAL USE PERMITS

Where, in an appeal of a decision to issue an outfitter and guide permit to a third party for the 1990 season, the appellant seeks to raise issues relating to the original issuance in 1987 of such a permit to the third party in 1987, such a challenge is barred by the doctrine of administrative finality.

The issuance of a special recreation use permit to conduct commercial outfitter and guide services on public land is discretionary, and the Department may accept or reject a permit application in furtherance of the objectives, responsibilities, and programs for management of the public lands involved. In light of this discretionary authority, BLM may use such restrictions as deemed necessary, including the imposition of a moratorium on the issuance of such permits while it is developing a management plan for outfitter and guide services.

Keith Rush dba Rush's Lakeview Ranch, Kevin Rush,
125 IBLA 346 (Mar. 29, 1993)

BLM has the discretionary authority under 43 U.S.C. § 1732(b) (1988), and 43 CFR Subpart 8372 to issue special recreation use permits for commercial float boating operations and to set permit conditions. There must be a compelling reason for modification or reversal of an exercise of this discretionary authority, and the Board will affirm a decision exercising this authority if the

PUBLIC LANDS--Continued

SPECIAL USE PERMITS--Continued

decision is not arbitrary, capricious, or an abuse of discretion.

BLM may limit commercial jet back service during the peak summer use period to protect public safety. The fact that BLM was contemplating revisions to the recreation management plan concerning commercial jet back services when the restrictions were imposed did not render the imposition arbitrary, capricious, or an abuse of discretion.

The Exodus Corp., 126 IBLA 1 (Apr. 1, 1993)

Issuance of a special recreation permit for off-road vehicle tours over existing roads and trails may be affirmed on appeal where the record establishes that the potential impacts were carefully considered and protective stipulations and mitigating measures were applied to avoid significant adverse environmental impacts.

Eastern Sierra Audubon Society, 126 IBLA 222 (May 21, 1993)

Issuance of a special recreation permit is discretionary, and BLM properly rejects an application for a permit for an organized off-road motorcycle event when there is evidence that the event could result in significant impacts to sensitive wildlife species and would be inconsistent with the management objectives, responsibilities, or programs for the public lands involved.

Checker Motorcycle Club, 126 IBLA 251 (June 1, 1993)

RECLAMATION LANDS

(See also Irrigation Claims, Rights-of-Way)

GENERALLY

The Act of Mar. 14, 1940 requires BOR to further both irrigation and tribal fishing uses of the Bull Lake Reservoir. However, the 1940 Act also requires that inconsistencies between tribal uses and reservoir purposes must be resolved to permit fulfillment of the reservoir purposes.

Where there is no reserved water right for maintenance of pool elevations in Bull Lake Reservoir, the Shoshone and Arapohoe Tribes cannot require BOR to maintain a particular reservoir level.

Bureau of Reclamation Responsibilities in Operating Bull Lake Reservoir, M-36973 (Feb. 21, 1992) 100 I.D. 185

REGULATIONS

(See also Administrative Procedure)

APPLICABILITY

Where an audit of a Federal oil and gas lease extends through Sept. 1988, a decision by MMS calculating royalty based on regulations that were effective only through Mar. 1, 1988, is properly set aside and the matter remanded for consideration of whether the audit pertaining to this lease should have been terminated on Mar. 1, 1988, or whether amended regulations should have been applied to the balance of the period through Sept. 1988.

Apache Corp., 127 IBLA 125 (Aug. 24, 1993)

REGULATIONS--Continued

INTERPRETATION

Regulations are interpreted in accordance with traditional principles of statutory construction. Words used in regulations are given their plain and ordinary meaning unless they are technical terms or terms of art, in which case they are given their technical meaning.

Okie Crude Co., et al. v. Muskogee Area Director, Bureau of Indian Affairs, 23 IBIA 174 (Feb. 5, 1993)

Regulations are interpreted in accordance with traditional principles of statutory construction. Where a BIA regulation contains parallel sections applicable to different classes of persons, and one section is lacking a provision which is included in the other section, the omission is significant to show that a different intent existed.

ZCA Gas Gathering, Inc. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 23 IBIA 228 (Mar. 8, 1993)

BIA regulations and guidelines concerning grant programs for Indian tribes are subject to the rule of construction that enactments intended to benefit Indians are to be liberally construed in their favor.

In administering competitive grant programs for Indian tribes, BIA has a duty to provide fair and equitable treatment to all applicants. This duty includes an obligation to ensure that the Bureau's Area Offices interpret the basic eligibility criteria for the programs in a consistent matter. It also includes an obligation to provide clear notice of the eligibility criteria to potential grant applicants.

Reno-Sparks Indian Colony v. Phoenix Area Director, Bureau of Indian Affairs, 24 IBIA 199 (Sept. 21, 1993)

RENT

The fair market value rental for a linear right-of-way is based upon the amount of land required to construct and maintain the pipeline. The mere fact that the pipeline is longer than it might be if the sole basis for choosing the route had been the per-acre rental charge is not a proper basis for concluding that the rental is too high.

The regulation at 43 CFR 2803.1-2 provides authority for reduction or waiver of rental for a right-of-way if requiring payment of the full rental will cause undue hardship on the holder and it is in the public interest to reduce or waive the rental. BLM need not consider applying this regulation when assessing the rental amount if there is no evidence that charging the full rental amount would cause undue hardship.

Jacqueline Balander, 125 IBLA 262 (Feb. 17, 1993)

When the right-of-way grant specifically provided for periodic rental adjustments to bring the right-of-way rental in line with fair market rental values it is proper for BLM to increase the annual rental to conform the rental amount to the current fair market rental value of the right-of-way.

When the holder of a right-of-way is a nonprofit municipal utility or cooperative, BLM may consider whether the holder is entitled to a reduction of rental pursuant to 43 CFR 2803.1-2(b)(2)(i) or (ii).

Valley Pioneers Water Co., Inc., 125 IBLA 326 (Mar. 25, 1993)

RENT--Continued

Where an existing FLPMA access road right-of-way grant provided that it was subject to the regulations in 43 CFR Part 2800, BLM properly established the rental for use thereof by utilizing the regulatory rental fee schedule for linear rights-of-way found at 43 CFR 2803.1-2(c) during the course of a periodic adjustment necessary to reflect the current fair market rental value. While the relevant statute and regulations provide for waiver or a reduction in the rental amount under certain circumstances, the right-of-way holder must prove eligibility for such consideration.

Ruth Tausta-White, 127 IBLA 101 (July 29, 1993)

RES JUDICATA

Where, in an appeal of a decision to issue an outfitter and guide permit to a third party for the 1990 season, the appellant seeks to raise issues relating to the original issuance in 1987 of such a permit to the third party in 1987, such a challenge is barred by the doctrine of administrative finality.

Keith Rush dba Rush's Lakeview Ranch, Kevin Rush, 125 IBLA 346 (Mar. 29, 1993)

The doctrines of collateral estoppel and res judicata will not preclude OSM from issuing its own CO in situations where the violation which is the basis of the CO was cited and litigated by a state regulatory authority because the statutory scheme of sec. 521(a)(2) of SMCRA mandates issuance of a CO in such a situation where the Federal oversight inspection discloses an unabated violation which is causing or can be expected to cause imminent environmental harm.

The doctrines of res judicata or collateral estoppel do not ordinarily preclude review of a CO issued by OSM for operations conducted without a valid permit where the state regulatory agency agreed to a

RES JUDICATA--Continued

settlement of the same violation which did not require performance of the reclamation mandated by law. OSM is neither a party to the case nor in privity with the state regulatory agency where the latter adopts a position inconsistent with that required by OSM.

Triple R Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 310 (June 16, 1993)

Regulations governing state land exchanges under sec. 8 of the Taylor Grazing Act required publication of notice in local newspapers providing an opportunity to protest the exchange application. Where the record discloses exchanges were not protested and were approved by a final decision, the doctrine of administrative finality precludes review of the propriety of the terms of the conveyances at the behest of a mining claimant who located claims on the lands more than 40 years later.

UOP, 127 IBLA 105 (Aug. 9, 1993)

RIGHTS-OF-WAY

(See also Indians, Reclamation Lands)

GENERALLY

Use of a road on Oregon and California lands for hauling logs before a permit is issued is a willful trespass under 43 CFR 2800.0-5(v).

Larry D. Olson, 126 IBLA 229 (May 24, 1993)

RIGHTS-OF-WAY--Continued

GENERALLY--Continued

A BLM decision finding a right-of-way for an electric distribution line null and void to the extent it conflicts with a Native allotment application is reversed and remanded to permit issuance of the Native allotment subject to the right-of-way where the record shows occupancy of the land by the power line was approved, and it was constructed and operated for 4 years before the Native allotment applicant began use and occupancy of his allotment.

Naknek Electric Ass'n, Inc., 126 IBLA 256 (June 2, 1993)

Under 43 CFR 2802.4(a), a right-of-way application to use public lands may be denied if BLM determines, among other things, that (1) the proposed right-of-way would be inconsistent with the purposes for which the public lands are managed, or (2) the proposed right-of-way would not be in the public interest. An application for an amendment of an existing right-of-way that seeks authorization for use of a substantial new parcel of public lands is properly reviewed in light of that regulation. BLM's decision rejecting the right-of-way application is properly affirmed where the case record amply supports its conclusion that the amendment would be inconsistent with BLM's management plan for the area and would not be in the public interest, as it would permanently destroy riparian lands and decrease habitat for the bald eagle, and would likely increase erosion.

The burden is on appellant, as the party challenging BLM's decision denying an application for amendment of a right-of-way, both to show adequate reason for appeal and, as appropriate, to support its allegations with evidence showing error. Conclusory allegations of error or differences of opinion, standing alone, do not suffice. The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. Where BLM has extensively researched the question of potential damage to riparian lands and concluded that they would be permanently harmed by proposed action, it is not enough that appellant offers a contrary opinion, but it must

RIGHTS-OF-WAY--Continued

GENERALLY--Continued

demonstrate by a preponderance of the evidence that BLM erred when collecting underlying data or in reaching its conclusion. BLM's decision is properly affirmed where appellant fails to do so.

King's Meadow Ranches, 126 IBLA 339 (June 17, 1993)

A BLM increase in the annual rental charge for a communications site right-of-way will be vacated where the record fails to demonstrate any relationship between the right-of-way subject to appraisal and a BLM master appraisal determining the market value of a "typical" BLM right-of-way, and where there is no indication that the communications site at issue matched the comparable factors in BLM's appraisal for a "typical" right-of-way.

Confidential Communications Co., 126 IBLA 349 (June 25, 1993)

In approving a Native allotment application, BLM properly reserved a 100-foot-wide easement across the allotment for an existing public road constructed along the route of a relinquished railroad right-of-way where the land had, prior to the Native's use and occupancy, been established by the Secretary of the Interior as part of a 100-foot-wide public highway pursuant to the Act of June 30, 1932, ch. 320, 47 Stat. 446, and then been quitclaimed to the State of Alaska. Reservation of an easement conforming to the width of the relinquished right-of-way was not required because that right-of-way ceased to exist when the relinquishment was accepted.

State of Alaska, Dept. of Transportation & Public Facilities, 127 IBLA 137 (Aug. 25, 1993)

RIGHTS-OF-WAY--Continued

GENERALLY--Continued

An increase in the annual rental charge for a communications site right-of-way will be set aside if the record fails to demonstrate any relationship between the right-of-way subject to appraisal and a BLM master appraisal determining the market value of a "typical" BLM right-of-way, and there is no indication that the comparable factors at the communications site at issue matched the comparable factors considered in BLM's appraisal of a "typical" right-of-way.

Western Tele-Communications, Inc., 127 IBLA 313
(Oct. 12, 1993)

An application for a right-of-way for transportation of water across a WSA was properly rejected by BLM because it was inconsistent with purposes for which the land was managed. A right-of-way for water facilities was not shown to have existed prior to initiation of wilderness review by title documents that made no reference to facilities to transport water, nor did traces of an old pipeline at the proposed right-of-way location tend to show the existence of a continuing right-of-way for such facilities.

Roger G. Gervais, Patsy V. Gervais, 128 IBLA 43 (Dec. 1, 1993)

ACT OF OCTOBER 21, 1976 (FLPMA)

Denial of an application for a right-of-way on the grounds that the right-of-way would destroy plants of a Category 1 candidate species under the Endangered Species Act and its habitat will be affirmed when the decision is based on a reasoned analysis of the factors involved, made in due regard for the public interest, and no significant reason is shown to disturb the decision. A showing that there is a possible difference

RIGHTS-OF-WAY--Continued

ACT OF OCTOBER 21, 1976 (FLPMA)--Continued

of scientific opinion on the issue of whether the candidate species is properly regarded as a subspecies is not sufficient to disturb BLM's decision.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

Under 43 CFR 2802.4(a), a right-of-way application to use public lands may be denied if BLM determines, among other things, that (1) the proposed right-of-way would be inconsistent with the purposes for which the public lands are managed, or (2) the proposed right-of-way would not be in the public interest. An application for an amendment of an existing right-of-way that seeks authorization for use of a substantial new parcel of public lands is properly reviewed in light of that regulation. BLM's decision rejecting the right-of-way application is properly affirmed where the case record amply supports its conclusion that the amendment would be inconsistent with BLM's management plan for the area and would not be in the public interest, as it would permanently destroy riparian lands and decrease habitat for the bald eagle, and would likely increase erosion.

The burden is on appellant, as the party challenging BLM's decision denying an application for amendment of a right-of-way, both to show adequate reason for appeal and, as appropriate, to support its allegations with evidence showing error. Conclusory allegations of error or differences of opinion, standing alone, do not suffice. The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. Where BLM has extensively researched the question of potential damage to riparian lands and concluded that they would be permanently harmed by proposed action, it is not enough that appellant offers a contrary opinion, but it must demonstrate by a preponderance of the evidence that BLM erred when collecting underlying data or in reaching its

RIGHTS-OF-WAY--Continued

ACT OF OCTOBER 21, 1976 (FLPMA)--Continued

conclusion. BLM's decision is properly affirmed where appellant fails to do so.

King's Meadow Ranches, 126 IBLA 339 (June 17, 1993)

APPLICATIONS

A BLM decision to issue a right-of-way grant for an irrigation ditch and associated structures will be affirmed on appeal when based on a reasoned analysis of all relevant factors, including the threat to the human environment from potential breaches of the ditch and to the rights of downstream water users from the diversion of water, and provided the decision was made with due regard for the public interest and sufficient reasons for disturbing the decision have not been shown.

Daryl Richardson et al., 125 IBLA 132 (Jan. 15, 1993)

Denial of an application for a right-of-way on the grounds that the right-of-way would destroy plants of a Category 1 candidate species under the Endangered Species Act and its habitat will be affirmed when the decision is based on a reasoned analysis of the factors involved, made in due regard for the public interest, and no significant reason is shown to disturb the decision. A showing that there is a possible difference of scientific opinion on the issue of whether the candidate species is properly regarded as a subspecies is not sufficient to disturb BLM's decision.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

RIGHTS-OF-WAY--Continued

APPLICATIONS--Continued

Use of public lands for the purpose of a National Guard Maneuver Area is not properly authorized pursuant to the grant of a right-of-way under sec. 501 of FLPMA, 43 U.S.C. § 1761 (1988).

State of Alaska, Division of State Lands, 127 IBLA 375
(Oct. 21, 1993)

An application for a right-of-way for transportation of water across a WSA was properly rejected by BLM because it was inconsistent with purposes for which the land was managed. A right-of-way for water facilities was not shown to have existed prior to initiation of wilderness review by title documents that made no reference to facilities to transport water, nor did traces of an old pipeline at the proposed right-of-way location tend to show the existence of a continuing right-of-way for such facilities.

Roger G. Gervais, Patsy V. Gervais, 128 IBLA 43 (Dec. 1, 1993)

APPRAISALS

The fair market value rental for a linear right-of-way is based upon the amount of land required to construct and maintain the pipeline. The mere fact that the pipeline is longer than it might be if the sole basis for choosing the route had been the per-acre rental charge is not a proper basis for concluding that the rental is too high.

The regulation at 43 CFR 2803.1-2 provides authority for reduction or waiver of rental for a right-of-way if requiring payment of the full rental will cause undue hardship on the holder and it is in the public interest to reduce or waive the rental. BLM need not consider applying this regulation when assessing the

RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

rental amount if there is no evidence that charging the full rental amount would cause undue hardship.

Jacqueline Balander, 125 IBLA 262 (Feb. 17, 1993)

When the right-of-way grant specifically provided for periodic rental adjustments to bring the right-of-way rental in line with fair market rental values it is proper for BLM to increase the annual rental to conform the rental amount to the current fair market rental value of the right-of-way.

When the holder of a right-of-way is a nonprofit municipal utility or cooperative, BLM may consider whether the holder is entitled to a reduction of rental pursuant to 43 CFR 2803.1-2(b)(2)(i) or (ii).

Valley Pioneers Water Co., Inc., 125 IBLA 326 (Mar. 25, 1993)

A BLM increase in the rental charge for a communication site right-of-way is properly affirmed where the holder of the right-of-way fails to establish that the appraisal upon which the increase is based incorrectly determined the fair market rental value of the right-of-way. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of the right-of-way rental or the appellant demonstrates that the resulting charges are excessive. Absent a showing of error in the appraisal methods, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Quality Broadcasting Corp., Unicom Broadcasting, Inc., 126 IBLA 174 (May 11, 1993)

RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

Where an existing FLPMA access road right-of-way grant provided that it was subject to the regulations in 43 CFR Part 2800, BLM properly established the rental for use thereof by utilizing the regulatory rental fee schedule for linear rights-of-way found at 43 CFR 2803.1-2(c) during the course of a periodic adjustment necessary to reflect the current fair market rental value. While the relevant statute and regulations provide for waiver or a reduction in the rental amount under certain circumstances, the right-of-way holder must prove eligibility for such consideration.

Ruth Tausta-White, 127 IBLA 101 (July 29, 1993)

An increase in the annual rental charge for a communications site right-of-way will be set aside if the record fails to demonstrate any relationship between the right-of-way subject to appraisal and a BLM master appraisal determining the market value of a "typical" BLM right-of-way, and there is no indication that the comparable factors at the communications site at issue matched the comparable factors considered in BLM's appraisal of a "typical" right-of-way.

Western Tele-Communications, Inc., 127 IBLA 313 (Oct. 12, 1993)

CANCELLATION

43 U.S.C. § 1766 (1988), and 43 CFR 2803.4(d) require written notice that cancellation of a right-of-way is contemplated for failure to comply with a condition of its granting and a reasonable opportunity to cure the noncompliance. A BLM decision cancelling a right-of-way without providing notice and a reasonable time to comply will be vacated.

John & Katherine Caton, 126 IBLA 335 (June 17, 1993)

RIGHTS-OF-WAY--Continued

CANCELLATION--Continued

In approving a Native allotment application, BLM properly reserved a 100-foot-wide easement across the allotment for an existing public road constructed along the route of a relinquished railroad right-of-way where the land had, prior to the Native's use and occupancy, been established by the Secretary of the Interior as part of a 100-foot-wide public highway pursuant to the Act of June 30, 1932, ch. 320, 47 Stat. 446, and then been quitclaimed to the State of Alaska. Reservation of an easement conforming to the width of the relinquished right-of-way was not required because that right-of-way ceased to exist when the relinquishment was accepted.

State of Alaska, Dept. of Transportation & Public Facilities, 127 IBLA 137 (Aug. 25, 1993)

CONDITIONS AND LIMITATIONS

The Federal grant for a pipeline right-of-way requires BLM to comply with sec. 106 of the National Historic Preservation Act, 16 U.S.C. § 470f (1988), on both Federal and non-Federal lands involved in the project.

Central Valley Electric Cooperative, Inc., 128 IBLA 126 (Dec. 22, 1993)

FEDERAL HIGHWAY ACT

A Native allotment was not subject to an amended right-of-way grant for a Federal-Aid Highway because the amendment was subject to valid existing rights and was made after initiation of the Native claim.

State of Alaska Dept. of Transportation & Public Facilities, 125 IBLA 291 (Mar. 9, 1993)

RIGHTS-OF-WAY--Continued

FEDERAL HIGHWAY ACT--Continued

That portion of a mining claim located on land subject to a pre-existing highway right-of-way granted to the State of California pursuant to the Federal Highway Act of Nov. 9, 1921, 42 Stat. 212, now the Federal Aid Highway Act, 23 U.S.C. § 317 (1988), is null and void ab initio.

Jesse R. Collins et al., 127 IBLA 122 (Aug. 23, 1993)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

A BLM decision to issue a right-of-way grant for an irrigation ditch and associated structures will be affirmed on appeal when based on a reasoned analysis of all relevant factors, including the threat to the human environment from potential breaches of the ditch and to the rights of downstream water users from the diversion of water, and provided the decision was made with due regard for the public interest and sufficient reasons for disturbing the decision have not been shown.

Daryl Richardson et al., 125 IBLA 132 (Jan. 15, 1993)

BLM is entitled (and required) to charge fair market rental for an existing water pipeline right-of-way issued pursuant to Title V of FLPMA, as amended, 43 U.S.C. §§ 1761-1771 (1988), even though no rental had been charged for a right-of-way or use authorization for the pipeline for a number of years prior to right-of-way issuance.

It does not matter that no surface uses of the land subject to an existing water pipeline right-of-way are or may be disrupted by the pipeline. The rental is charged for the right to use the land, and would accrue even if the right-of-way holder did not use the land.

The fair market value rental for a linear right-of-way is based upon the amount of land required to

RIGHTS-OF-WAY--Continued

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

construct and maintain the pipeline. The mere fact that the pipeline is longer than it might be if the sole basis for choosing the route had been the per-acre rental charge is not a proper basis for concluding that the rental is too high.

The regulation at 43 CFR 2803.1-2 provides authority for reduction or waiver of rental for a right-of-way if requiring payment of the full rental will cause undue hardship on the holder and it is in the public interest to reduce or waive the rental. BLM need not consider applying this regulation when assessing the rental amount if there is no evidence that charging the full rental amount would cause undue hardship.

Jacqueline Balander, 125 IBLA 262 (Feb. 17, 1993)

Denial of an application for a right-of-way on the grounds that the right-of-way would destroy plants of a Category 1 candidate species under the Endangered Species Act and its habitat will be affirmed when the decision is based on a reasoned analysis of the factors involved, made in due regard for the public interest, and no significant reason is shown to disturb the decision. A showing that there is a possible difference of scientific opinion on the issue of whether the candidate species is properly regarded as a subspecies is not sufficient to disturb BLM's decision.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

When the right-of-way grant specifically provided for periodic rental adjustments to bring the right-of-way rental in line with fair market rental values it is proper for BLM to increase the annual rental to conform the rental amount to the current fair market rental value of the right-of-way.

When the holder of a right-of-way is a nonprofit municipal utility or cooperative, BLM may consider

RIGHTS-OF-WAY--Continued

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

whether the holder is entitled to a reduction of rental pursuant to 43 CFR 2803.1-2(b)(2)(i) or (ii).

Valley Pioneers Water Co., Inc., 125 IBLA 326 (Mar. 25, 1993)

43 U.S.C. § 1766 (1988), and 43 CFR 2803.4(d) require written notice that cancellation of a right-of-way is contemplated for failure to comply with a condition of its granting and a reasonable opportunity to cure the noncompliance. A BLM decision cancelling a right-of-way without providing notice and a reasonable time to comply will be vacated.

John & Katherine Caton, 126 IBLA 335 (June 17, 1993)

Under 43 CFR 2802.4(a), a right-of-way application to use public lands may be denied if BLM determines, among other things, that (1) the proposed right-of-way would be inconsistent with the purposes for which the public lands are managed, or (2) the proposed right-of-way would not be in the public interest. An application for an amendment of an existing right-of-way that seeks authorization for use of a substantial new parcel of public lands is properly reviewed in light of that regulation. BLM's decision rejecting the right-of-way application is properly affirmed where the case record amply supports its conclusion that the amendment would be inconsistent with BLM's management plan for the area and would not be in the public interest, as it would permanently destroy riparian lands and decrease habitat for the bald eagle, and would likely increase erosion.

The burden is on appellant, as the party challenging BLM's decision denying an application for amendment of a right-of-way, both to show adequate reason for appeal and, as appropriate, to support its allegations with evidence showing error. Conclusory allegations of error or differences of opinion, standing alone, do not suffice. The Department is entitled to

RIGHTS-OF-WAY--Continued

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

rely on the reasoned analysis of its experts in matters within the realm of their expertise. Where BLM has extensively researched the question of potential damage to riparian lands and concluded that they would be permanently harmed by proposed action, it is not enough that appellant offers a contrary opinion, but it must demonstrate by a preponderance of the evidence that BLM erred when collecting underlying data or in reaching its conclusion. BLM's decision is properly affirmed where appellant fails to do so.

King's Meadow Ranches, 126 IBLA 339 (June 17, 1993)

Where an existing FLPMA access road right-of-way grant provided that it was subject to the regulations in 43 CFR Part 2800, BLM properly established the rental for use thereof by utilizing the regulatory rental fee schedule for linear rights-of-way found at 43 CFR 2803.1-2(c) during the course of a periodic adjustment necessary to reflect the current fair market rental value. While the relevant statute and regulations provide for waiver or a reduction in the rental amount under certain circumstances, the right-of-way holder must prove eligibility for such consideration.

Ruth Tausta-White, 127 IBLA 101 (July 29, 1993)

An application for a right-of-way for transportation of water across a WSA was properly rejected by BLM because it was inconsistent with purposes for which the land was managed. A right-of-way for water facilities was not shown to have existed prior to initiation of wilderness review by title documents that made no reference to facilities to transport water, nor did traces of an old pipeline at the proposed right-of-way

RIGHTS-OF-WAY--Continued

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

location tend to show the existence of a continuing right-of-way for such facilities.

Roger G. Gervais, Patsy V. Gervais, 128 IBLA 43 (Dec. 1, 1993)

The Federal grant for a pipeline right-of-way requires BLM to comply with sec. 106 of the National Historic Preservation Act, 16 U.S.C. § 470f (1988), on both Federal and non-Federal lands involved in the project.

Central Valley Electric Cooperative, Inc., 128 IBLA 126 (Dec. 22, 1993)

NATURE OF INTEREST GRANTED

A Native allotment was not subject to an amended right-of-way grant for a Federal-Aid Highway because the amendment was subject to valid existing rights and was made after initiation of the Native claim.

State of Alaska Dept. of Transportation & Public Facilities, 125 IBLA 291 (Mar. 9, 1993)

OIL AND GAS PIPELINES

A decision approving a right-of-way for an oil and gas pipeline on public lands on the basis of an EA finding no significant impact which is tiered to a programmatic EIS for oil and gas leasing in the area will be affirmed where BLM has considered the cumulative impact of the right-of-way and the foreseeable oil and gas development to be served thereby and the record provides a reasonable basis for the conclusion that

RIGHTS-OF-WAY--Continued

OIL AND GAS PIPELINES--Continued

there will be no significant impacts other than those addressed in the EIS.

Southern Utah Wilderness Alliance, 127 IBLA 282 (Oct. 7, 1993)

RULES OF PRACTICE

(See also Administrative Procedure, Appeals, Contests & Protests, Contracts, Hearings, Indian Probate, Practice Before the Department)

GENERALLY

When presenting evidence to overcome a Government's prima facie case that the claim is not supported by a discovery the claimants are not limited to rebutting the evidence submitted by the mineral examiners, and may present evidence of the location of the claims and the location of mineralization at any place on the claims, including places not examined or sampled by the mineral examiners.

United States v. Estate of Melvin E. Viles, Mary S. Viles, 126 IBLA 162 (May 10, 1993)

APPEALS

Generally

A person who has participated in the decisionmaking process in the capacity of president of a corporation is party to a case in his personal capacity.

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

An adverse effect on a competitor's economic interests is a legally cognizable interest sufficient to grant the competitor a right of appeal.

Allen E. Miller, 125 IBLA 139 (Jan. 15, 1993)

Under the provisions of 43 CFR 3101.7-3, a third-party objecting to issuance of an oil and gas lease on land within the National Forest System, pursuant to the consent of the FS, has standing to appeal to the Interior Board of Land Appeals. However, to the extent that the third-party raises objections to the conformity of actions undertaken by the FS with respect to its own internal operating procedures or with laws solely applicable to the FS, the Board will not review such contentions where the FS has provided its own appeal system for the resolution of such issues.

Colorado Environmental Coalition, 125 IBLA 210 (Feb. 5, 1993)

Where, in an appeal of a decision to issue an outfitter and guide permit to a third party for the 1990 season, the appellant seeks to raise issues relating to the original issuance in 1987 of such a permit to the third party in 1987, such a challenge is barred by the doctrine of administrative finality.

Keith Rush dba Rush's Lakeview Ranch, Kevin Rush, 125 IBLA 346 (Mar. 29, 1993)

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

The doctrines of res judicata or collateral estoppel do not ordinarily preclude review of a CO issued by OSM for operations conducted without a valid permit where the state regulatory agency agreed to a settlement of the same violation which did not require performance of the reclamation mandated by law. OSM is neither a party to the case nor in privity with the

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

state regulatory agency where the latter adopts a position inconsistent with that required by OSM.

Triple R Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 310 (June 16, 1993)

Board of Land Appeals

An appeal from a BLM decision to issue a land-use permit is dismissed when the permit applicant attacks the permit on the ground that title to the permitted land is not held by the U.S., but is instead owned by the applicant. The application for a land-use permit was an admission by the applicant that the land sought was public land.

Lawrence Smart Trust, 127 IBLA 55 (July 20, 1993)

Burden of Proof

The burden is on appellant, as the party challenging BLM's decision denying an application for amendment of a right-of-way, both to show adequate reason for appeal and, as appropriate, to support its allegations with evidence showing error. Conclusory allegations of error or differences of opinion, standing alone, do not suffice. The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. Where BLM has extensively researched the question of potential damage to riparian lands and concluded that they would be permanently harmed by proposed action, it is not enough that appellant offers a contrary opinion, but it must demonstrate by a preponderance of the evidence that BLM erred when collecting underlying data or in reaching its

RULES OF PRACTICE--Continued

APPEALS--Continued

Burden of Proof--Continued

conclusion. BLM's decision is properly affirmed where appellant fails to do so.

King's Meadow Ranches, 126 IBLA 339 (June 17, 1993)

When the parties sought summary judgment on the same issue; stated in a report to the Board that no significant facts were disputed; had an opportunity for discovery and to submit affidavits and documentary evidence; available BIA records had been produced; and the issue involved an unambiguous integrated written agreement, such that credibility assessments would be immaterial; the Board concluded that little would be gained by a hearing. Because the material facts upon which it relied were uncontroverted, summary judgment was appropriate.

To prove an express contract with BIA, appellant had to establish mutual intent to be bound; the authority of BIA's representative; and consideration. Because compromise of a disputed claim was involved, accord and satisfaction principles were relevant: proper subject matter, competent parties, meeting of the minds, and consideration reflected by a bona fide dispute.

Appeal of Busby School Board of the Northern Cheyenne Tribe, IBCA-3007 (Aug. 25, 1993) 100 I.D. 301

In cases where the amount of land originally applied for in a Native allotment application is at issue, the proper standard of proof to be applied is the preponderance of the evidence.

United States v. Heirs of Ambrose Kozevnikoff, 128 IBLA 130 (Dec. 30, 1993)

RULES OF PRACTICE--Continued

APPEALS--Continued

Discovery

In applying its discovery rules, the Interior Board has adopted a flexible application of the term "good cause" and strongly encourages parties to engage in informal, cooperative, relevant, discovery to the extent practicable, without abusing the process.

The Board held that, consistent with the amended Federal Rules of Civil Procedure, no later than 30 days before hearing, both parties were to identify their proposed lay hearing witnesses and exhibits, and to exchange those exhibits not already in the other's possession.

Each party was to notify the other of any experts to be called at hearing as soon as those experts were identified and was to supply the other with a copy of any expert report or exhibit as soon as prepared. Without the need to request subpoenas from the Board, each party could depose the other's expert report or exhibit. In any case, expert identification and production of any expert report or exhibit was to occur no later than 60 days before hearing.

Without the need to request subpoenas from the Board, each party could notice and take the depositions of the other's knowledgeable personnel, based upon its own analysis, and/or upon the other's response to a Fed. R. Civ. P. 30(b)(6) notice. If a party deemed the number of depositions or particular individuals to be deposed to be unreasonable, it could seek a protective order.

The Board issued rulings on interrogatories and requests for production of documents to which the Government had objected on the grounds that the requested information had been supplied through document production, or that the requests were overly broad or irrelevant. The Board agreed that some of appellant's

RULES OF PRACTICE--Continued

APPEALS--Continued

Discovery--Continued

interrogatories and document production requests were overly broad, but found others to be relevant, and directed various responses by the Government.

The Board found that disputed requests for admission were relevant and clear and directed responses.

Appeals of Federal Insurance Co., IBCA-3236 (Dec. 22, 1993) 100 I.D. 448

Dismissal

A corporate vice president and member of the contractor's Board of Directors, who was demonstrated to have responsibility for corporate activities substantially equivalent to that of the contractor's president, qualified under FAR 33.207(c)(2)(ii) to certify the contractor's Contract Disputes Act claims as "(a)n officer * * * of the contractor having overall responsibility for the conduct of the contractor's affairs."

Appeals of Tecom, IBCA-2970 (Jan. 15, 1993) 100 I.D. 1

An appeal from a BLM decision to issue a land-use permit is dismissed when the permit applicant attacks the permit on the ground that title to the permitted land is not held by the U.S., but is instead owned by the applicant. The application for a land-use permit was an admission by the applicant that the land sought was public land.

Lawrence Smart Trust, 127 IBLA 55 (July 20, 1993)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

When an oil and gas lease operator challenges incidents of noncompliance that have been removed from the record by the decision under appeal and the operator does not contest the fact of violation, the appeal will be dismissed because there is no effective relief that can be afforded to the operator by the Board.

Petro-X Corp., 127 IBLA 111 (Aug. 12, 1993)

When the contractor had timely completed the contract; had described as moot its appeal from the contracting officer's decision denying it a 7-day extension due to a partial suspend work order; and had subsumed the acceleration and impact aspects of its appeal into its other, unsuccessful, acceleration and impact appeals, the Board dismissed the earlier appeal with prejudice.

Appeals of Michael-Mark Ltd., IBCA-2697 (Oct. 1, 1993)
100 I.D. 329

Effect of

Except as otherwise provided by law or other pertinent regulation, a decision issued before Feb. 18, 1993, will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. It is not necessary to seek a stay of a decision issued prior to Feb. 18, 1993, which is

RULES OF PRACTICE--Continued

APPEALS--Continued

Effect_of--Continued

not automatically effective by law or pertinent regulation, and a request for an extension of time in which to file a stay request will be denied.

Committee for Idaho's High Desert, 123 IBLA 301
(Mar. 16, 1993)

The effectiveness of a BLM decision to round up and remove wild horses during the pendency of an appeal to the Board of Land Appeals is controlled by 43 CFR 4770.3(c), not by 43 CFR 4.21(a) (58 FR 4942-43 (Jan. 19, 1993)). Where BLM fails to place its roundup decision into full force and effect on a specified date, pursuant to 43 CFR 4770.3(c), and a notice of appeal of that decision is timely filed, it is error for BLM to proceed with the roundup, as the effect of BLM's decision is stayed during the appeal period and pending the Board's ruling on the appeal.

Animal Protection Institute of America, 128 IBLA 90
(Dec. 10, 1993)

Extensions_of Time

Except as otherwise provided by law or other pertinent regulation, a decision issued before Feb. 18, 1993, will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. It is not necessary to seek a stay of a decision issued prior to Feb. 18, 1993, which is

RULES OF PRACTICE--Continued

APPEALS--Continued

Extensions of Time--Continued

not automatically effective by law or pertinent regulation, and a request for an extension of time in which to file a stay request will be denied.

Committee for Idaho's High Desert, 123 IBLA 301
(Mar. 16, 1993)

Failure to Appeal

Upon the failure of a mining claimant to appeal from a decision cancelling recordation of a mining claim under sec. 314 of FLPMA, 43 U.S.C. § 1744 (1988), all rights under the location are conclusively deemed to be abandoned and void.

Robert L. Mendenhall et al., 127 IBLA 73 (July 20, 1993)

Failure of the operator to appeal assessment decisions for incidents of noncompliance issued for violations of the oil and gas operations regulations renders those decisions and the findings contained therein final for the Department and precludes the operator from challenging the merits of the violations or the amounts assessed in a subsequent appeal of a decision demanding payment.

CCCo., 127 IBLA 291 (Oct. 7, 1993)

RULES OF PRACTICE--Continued

APPEALS--Continued

Hearings

Where the record raises a question of fact regarding whether an individual, charged by BLM under 43 CFR 2920.1-2(a) with the costs of removing structures allegedly placed in trespass on public lands, was responsible for their construction or use, the case will be referred for a hearing on that question.

John H. Peterson, 125 IBLA 267 (Feb. 17, 1993)

An appraisal will not be set aside unless an appellant shows error in the method of appraisal or shows by convincing evidence that the charges are excessive. When the decision of an ALJ does not clearly apply to this standard, the Board will review the evidence and the arguments of the parties to determine whether the result reached should be considered erroneous.

Richard Connie Nielson v. The Bureau of Land Management, 125 IBLA 353 (Mar. 30, 1993)

Although the Board has discretionary authority to order a hearing before an ALJ pursuant to 43 CFR 4.415, a hearing is necessary only when there is a material issue of fact requiring resolution through the introduction of testimony and other evidence.

Vanderbilt Gold Corp., 126 IBLA 72 (Apr. 19, 1993)

Although authorized under 43 CFR 4.415, a fact-finding hearing will be ordered only when the record before the Board presents conflicting issues of fact that cannot be resolved on the basis of that record. Where appellant fails to submit all available evidence to the Board, it is not possible to conclude that the

RULES OF PRACTICE--Continued

APPEALS--Continued

Hearings--Continued

evidence is irreconcilable, and the request for hearing is properly denied.

Pine Grove Farms, 126 IBLA 269 (June 3, 1993)

Jurisdiction

A corporate vice president and member of the contractor's Board of Directors, who was demonstrated to have responsibility for corporate activities substantially equivalent to that of the contractor's president, qualified under FAR 33.207(c)(2)(ii) to certify the contractor's Contract Disputes Act claims as "(a)n officer * * * of the contractor having overall responsibility for the conduct of the contractor's affairs."

Appeals of Tecom, IBCA-2970 (Jan. 15, 1993)

100 I.D. 1

Although OHA does not have authority to review the merits of biological opinions issued by the U.S. Fish & Wildlife Service under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), it has jurisdiction over an appeal from the rejection by BLM of an application for a right-of-way on the grounds that the right-of-way would destroy a Category 1 candidate species of plant and its habitat.

Edward R. Woodside, 125 IBLA 317 (Mar. 25, 1993)

RULES OF PRACTICE--Continued

APPEALS--Continued

Jurisdiction--Continued

An appeal from a BLM decision to issue a land-use permit is dismissed when the permit applicant attacks the permit on the ground that title to the permitted land is not held by the U.S., but is instead owned by the applicant. The application for a land-use permit was an admission by the applicant that the land sought was public land.

Lawrence Smart Trust, 127 IBLA 55 (July 20, 1993)

In an appeal alleging an agreement with the contracting officer settling a dispute under contracts issued pursuant to the Indian Self-Determination and Education Assistance Act, which provides that the CDA shall apply, the contracting officer's proclaimed final decision denying Busby's properly certified claim imbued the Board with jurisdiction under the CDA to determine whether the claim had been settled.

Appeal of Busby School Board of the Northern Cheyenne Tribe, IBCA-3007 (Aug. 25, 1993) 100 I.D. 301

OHA does not have authority to review the merits of biological opinions issued by the U.S. FWS under sec. 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988); however, an appellant's arguments concerning consistency with a biological opinion would normally be subject to review.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

RULES OF PRACTICE--Continued

APPEALS--Continued

Mootness

An appeal from a BLM decision to round up horses is not moot, even though the horses have been removed, as remedies are available (even apart from returning the same horses to the range) if BLM's decision is found to be in error. BLM may be directed to allow the population of wild horses to return to its former numbers or to repopulate the range with other animals taken from its holding areas. Further, the appeal is not moot, as it is capable of repetition, in that the population of wild horses may return in time to former numbers through propagation of the remaining horses.

Animal Protection Institute of America, 128 IBLA 90 (Dec. 10, 1993)

Motions

A corporate vice president and member of the contractor's Board of Directors, who was demonstrated to have responsibility for corporate activities substantially equivalent to that of the contractor's president, qualified under FAR 33.207(c)(2)(ii) to certify the contractor's Contract Disputes Act claims as "(a)n officer * * * of the contractor having overall responsibility for the conduct of the contractor's affairs."

Appeals of Tecom, IBCA-2970 (Jan. 15, 1993)

100 I.D. 1

Except as otherwise provided by law or other pertinent regulation, a decision issued before Feb. 18, 1993, will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. It is not necessary to seek a stay of a decision issued prior to Feb. 18, 1993, which is

RULES OF PRACTICE--Continued

APPEALS--Continued

Motions--Continued

not automatically effective by law or pertinent regulation, and a request for an extension of time in which to file a stay request will be denied.

Committee for Idaho's High Desert, 123 IBLA 301
(Mar. 16, 1993)

An appeal from a BLM decision to issue a land-use permit is dismissed when the permit applicant attacks the permit on the ground that title to the permitted land is not held by the U.S., but is instead owned by the applicant. The application for a land-use permit was an admission by the applicant that the land sought was public land.

Lawrence Smart Trust, 127 IBLA 55 (July 20, 1993)

When the parties sought summary judgment on the same issue; stated in a report to the Board that no significant facts were disputed; had an opportunity for discovery and to submit affidavits and documentary evidence; available BIA records had been produced; and the issue involved an unambiguous integrated written agreement, such that credibility assessments would be immaterial; the Board concluded that little would be gained by a hearing. Because the material facts upon which it relied were uncontroverted, summary judgment was appropriate.

Appeal of Busby School Board of the Northern Cheyenne Tribe, IBCA-3007 (Aug. 25, 1993) 100 I.D. 301

RULES OF PRACTICE--Continued

APPEALS--Continued

Notice_of Appeal

The time limits for protesting a proposed decision under 43 CFR 4160.2 and for filing an appeal of a final decision under 43 CFR 4160.3 and 4160.4 are mandatory. If a proposed decision is not protested within 15 days after it is received, it becomes a final decision without further notice and is then subject to appeal for 30 days.

William J. Thoman v. Bureau of Land Management, 125 IBLA 100 (Jan. 8, 1993)

Protests

The time limits for protesting a proposed decision under 43 CFR 4160.2 and for filing an appeal of a final decision under 43 CFR 4160.3 and 4160.4 are mandatory. If a proposed decision is not protested within 15 days after it is received, it becomes a final decision without further notice and is then subject to appeal for 30 days.

William J. Thoman v. Bureau of Land Management, 125 IBLA 100 (Jan. 8, 1993)

Standing_to Appeal

A person who has participated in the decisionmaking process in the capacity of president of a corporation is party to a case in his personal capacity.

An adverse effect on a competitor's economic interests is a legally cognizable interest sufficient to grant the competitor a right of appeal.

Allen E. Miller, 125 IBLA 139 (Jan. 15, 1993)

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

A party will not be accorded standing to appeal from a BLM decision where it does not demonstrate that it has a legally cognizable interest which has been adversely affected by that decision. Where the party appeals a BLM record of decision that, by itself, has no consequences, actual or threatened, so far as the environment and any members of the public are concerned because no activity can take place until after preparation of site-specific environmental analyses; and where any adverse consequences would occur, if at all, only if BLM decides to lease particular parcels, the party lacks standing to appeal the ROD because it has not yet been adversely affected by such decision, that is, its appeal is premature.

Colorado Environmental Coalition, 125 IBLA 287 (Feb. 26, 1993)

Standing to appeal requires that an appellant be a party to the case adversely affected by the decision below. Organizations which did not participate in proceedings leading up to the appeal are not "part(es) to a case" within the meaning of 43 CFR 4.410(a) for purposes of appeal and their appeals are properly dismissed for lack of standing.

Nat'l Wildlife Federation et al., 126 IBLA 48 (Apr. 14, 1993)

With respect to lands which have been conveyed out of Federal ownership, a decision accepting a Native allotment application as amended is not an adversarial adjudication of entitlement of the applicant to an allotment which is dispositive of the rights of the applicant or adverse parties since DOI lacks jurisdiction to make such a ruling in the absence of legal title. In this context, an appeal by an adverse party is properly dismissed as premature. If the land is

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

reconveyed, any decision adjudicating the amended location will be subject to appeal.

Bay View, Inc., 126 IBLA 281 (June 7, 1993)

Even though an appellant did not actively participate in the process leading to the issuance of the BLM ADC decision, where the appellant expressly requested leave to participate in that process and where BLM led appellant to believe that it would have an opportunity to do so, appellant was a "party to the case" as described in 43 CFR 4.410(a). Further, where the appellant makes a specific, colorable allegation in its notice of appeal that its members use an area affected by BLM's ADC plan, appellant is "adversely affected" within the meaning of 43 CFR 4.410(a). As both elements of that regulation are met, appellant has standing to appeal.

Predator Project, 127 IBLA 50 (July 20, 1993)

When an oil and gas lease operator challenges incidents of noncompliance that have been removed from the record by the decision under appeal and the operator does not contest the fact of violation, the appeal will be dismissed because there is no effective relief that can be afforded to the operator by the Board.

Petro-X Corp., 127 IBLA 111 (Aug. 12, 1993)

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing_to Appeal--Continued

In order to have standing to appeal to the Board of Land Appeals, the appellant must have been adversely affected by the decision being appealed. If no right to appeal exists, a party may be granted amicus curiae status.

Dvorak Expeditions et al., 127 IBLA 145 (Aug. 25, 1993)

Standing before the Board of Land Appeals is governed by 43 CFR 4.410(a), and the decisional law of the Department, and not by judicial determinations on standing.

The appeal of an administrative determination by BLM that a road is a R.S. 2477 right-of-way will be dismissed for lack of standing where the appellant makes no colorable allegation of adverse effect. That a group's organizational interest in protection of the public lands, which its members utilize, might be adversely affected by a BLM action is not subject to dispute. However, the group may not rely on that general organizational interest alone in challenging a BLM action. It must identify how the particular BLM action in question actually adversely affects its interest.

Southern Utah Wilderness Alliance, 127 IBLA 325 (Oct. 14, 1993)

A protest against an exchange of public for private land made pursuant to sec. 206 of FLPMA was properly denied when it was not established, as alleged, that the exchange would violate the Oregon and California Railroad and Reconveyed Coos Bay Grant Lands Act, statutory and regulatory requirements establishing minimum allowable value for exchange lands, or adversely affect local economies directly concerned with the exchange, or contravene the public interest. An allegation that a timber processor would be competitively

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

disadvantaged by an exchange of a timbered tract to another timber company is found to be sufficient to establish standing to appeal from a denial of a protest against the pro-posed exchange but insufficient to establish that the exchange was not in the interest of the United States.

Swanson-Superior Forest Products, Inc., 127 IBLA 379 (Oct. 27, 1993)

Statement of Reasons

The failure to file a SOR subjects an appeal to summary dismissal. 43 CFR 4.402(a). If no SOR or reason for the failure to file a SOR is filed, the appeal is properly dismissed.

Dvorak Expeditions et al., 127 IBLA 145 (Aug. 25, 1993)

A decision by BLM denying a protest of a timber sale may be affirmed where the SOR filed in support of an appeal merely repeats, with little change, arguments raised in the protest and fails to present any new issues or point out any error in the decision appealed from, and the BLM decision is comprehensive and fully addresses each of the arguments contained in the protest.

In Re Eastside Salvage Timber Sale, 128 IBLA 114 (Dec. 20, 1993)

RULES OF PRACTICE--Continued

APPEALS--Continued

Stay

Except as otherwise provided by law or other pertinent regulation, a decision issued before Feb. 18, 1993, will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. It is not necessary to seek a stay of a decision issued prior to Feb. 18, 1993, which is not automatically effective by law or pertinent regulation, and a request for an extension of time in which to file a stay request will be denied.

Committee for Idaho's High Desert, 123 IBLA 301
(Mar. 16, 1993)

An appeal from a BLM decision to issue a land-use permit is dismissed when the permit applicant attacks the permit on the ground that title to the permitted land is not held by the U.S., but is instead owned by the applicant. The application for a land-use permit was an admission by the applicant that the land sought was public land.

Lawrence Smart Trust, 127 IBLA 55 (July 20, 1993)

The provisions of 43 CFR 4.21(a), 58 FR 4939, 4942-43 (Jan. 19, 1993), govern the effect of a decision pending appeal "[e]xcept as otherwise provided by law or pertinent regulation." Because 43 CFR 4770.3(c) authorizes BLM to place into full force and effect a decision to remove wild horses from public or private land regardless of an appeal, the effect of such removal decisions pending appeal are controlled by that regulation, not 43 CFR 4.21(a), and BLM's failure to place

RULES OF PRACTICE--Continued

APPEALS--Continued

Stay--Continued

such a decision into full force and effect effectively stays the removal decision pending appeal.

Michael Blake et al., 127 IBLA 109 (Aug. 12, 1993)

Under 43 CFR 4.21(a)(2), 58 FR 4942-43 (Jan. 19, 1993), a decision will be effective on the day after the expiration of the time during which a person adversely affected may file a notice of appeal unless a petition for stay pending appeal is filed together with a timely notice of appeal. Where a notice of appeal is timely filed, but the petition for stay is filed after the expiration of the time period for filing an appeal, the petition is untimely and the decision becomes effective on the day after the expiration of the appeal period. However, nothing in the regulations precludes the filing of a subsequent petition for stay, and the Board of Land Appeals, in its discretion, may entertain such a petition.

A petition for stay of a decision denying a mining plan of operations in a WSA, if granted, would not authorize the activities set forth in that plan. The granting of a stay would merely mean that the denial would not be effective during the pendency of the stay; it would not constitute approval of the pending plan of operations.

Robert E. Oriskovich, 128 IBLA 69 (Dec. 6, 1993)

The effectiveness of a BLM decision to round up and remove wild horses during the pendency of an appeal to the Board of Land Appeals is controlled by 43 CFR 4770.3(c), not by 43 CFR 4.21(a) (58 FR 4942-43 (Jan. 19, 1993)). Where BLM fails to place its roundup decision into full force and effect on a specified date, pursuant to 43 CFR 4770.3(c), and a notice of appeal of that decision is timely filed, it is error for BLM to

RULES OF PRACTICE--Continued

APPEALS--Continued

Stay--Continued

proceed with the roundup, as the effect of BLM's decision is stayed during the appeal period and pending the Board's ruling on the appeal.

Animal Protection Institute of America, 128 IBLA 90
(Dec. 10, 1993)

The provisions of 43 CFR 4.21(a), 58 FR 4942-43 (Jan. 19 1993), govern the effect of a decision pending appeal "[e]xcept as otherwise provided by law or pertinent regulation." The regulations governing the administration of forest management decisions, including timber sale decisions, 43 CFR Part 5000, contain a "pertinent regulation" that meets the exception of 43 CFR 4.21(a). Under 43 CFR 5003.1, "[t]he filing of a notice of appeal under part 4 of this title shall not automatically suspend the effect of a decision governing or relating to forest management as described under subparts 5003.2 and 5003.3," and upon denial of a protest, the authorized officer may proceed with implementation of the decision. 43 CFR 5003.3(f).

In Re Eastside Salvage Timber Sale, 128 IBLA 114
(Dec. 20, 1993)

Timely_Filing

The time limits for protesting a proposed decision under 43 CFR 4160.2 and for filing an appeal of a final decision under 43 CFR 4160.3 and 4160.4 are mandatory. If a proposed decision is not protested within 15 days

RULES OF PRACTICE--Continued

APPEALS--Continued

Timely_Filing--Continued

after it is received, it becomes a final decision without further notice and is then subject to appeal for 30 days.

William J. Thoman v. Bureau of Land Management, 125 IBLA 100 (Jan. 8, 1993)

An individual's request "to add her name" to a timely filed appeal by an organization is properly denied if not filed within the 30-day timeframe established by regulation. Where the individual indicates that she has been an interested party to Wyoming's management of wild horses for several years, she may either provide input to the organization so that it may incorporate her views or may request permission to appeal as amicus curiae.

Animal Protection Institute of America, 128 IBLA 90 (Dec. 10, 1993)

EVIDENCE

An appraisal will not be set aside unless an appellant shows error in the method of appraisal or shows by convincing evidence that the charges are excessive. When the decision of an ALJ does not clearly apply to this standard, the Board will review the evidence and the arguments of the parties to determine whether the result reached should be considered erroneous.

Richard Connie Nielson v. The Bureau of Land Management, 125 IBLA 353 (Mar. 30, 1993)

RULES OF PRACTICE--Continued

EVIDENCE--Continued

A continuance of a hearing into the validity of a mining claim will only be granted where the mining claimant presents sufficient reason to justify the grant of an additional opportunity to present his case, *i.e.*, where circumstances have placed a substantial constraint upon his ability to obtain or offer samples or other evidence of a discovery.

United States v. Mineco, United States v. Cyrus L. & Mary F. Colburn, United States v. Cache Properties, 127 IBLA 181 (Sept. 7, 1993)

Although an appellant bears the burden of demonstrating error where BLM has determined that a proposed action is not likely to affect a threatened or endangered species, the record on appeal must support BLM's action, and where BLM concludes that the drilling of a natural gas well will not affect the bald eagle because no active eyries or nests were located during the survey of the area, but the record fails to show that searches for bald eagles were conducted in the winter and early spring when bald eagles are known to inhabit the area, BLM's determination will be set aside and the case remanded.

Where, in response to a challenge to approval of an APD to drill a natural gas well, BLM states that no special status plant species, including threatened and endangered plants, were found during a survey of the proposed project area, such a determination must be supported by the record. When the record on appeal contains no evidence of who conducted the survey, any field report, or any description of the methodology employed in making the determination, that determination will be set aside and the case remanded.

A determination by BLM that approval of an APD to drill a natural gas well will not eliminate a river from eligibility for potential inclusion within the National Wild and Scenic River System, pursuant to sec. 5(d) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1276(d) (1988), is supported by the record where there is no

RULES OF PRACTICE--Continued

EVIDENCE--Continued

evidence in the record that drilling the well in question would adversely affect all the river's outstandingly remarkable values so as to render it ineligible for consideration.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

HEARINGS

In referring a case for a hearing, the Board will normally identify the subject matter and one or more issues. Such instructions do not preclude an ALJ from receiving evidence on and considering all relevant matters. The fact the Board does not comment on or rule upon all aspects of a case when referring it for a hearing does not mean that they are accepted as correct or made the law of the case.

Richard Connie Nielson v. The Bureau of Land Management, 125 IBLA 353 (Mar. 30, 1993)

Although the Board has discretionary authority to order a hearing before an ALJ pursuant to 43 CFR 4.415, a hearing is necessary only when there is a material issue of fact requiring resolution through the introduction of testimony and other evidence.

Vanderbilt Gold Corp., 126 IBLA 72 (Apr. 19, 1993)

RULES OF PRACTICE--Continued

HEARINGS--Continued

When presenting evidence to overcome a Government's prima facie case that the claim is not supported by a discovery the claimants are not limited to rebutting the evidence submitted by the mineral examiners, and may present evidence of the location of the claims and the location of mineralization at any place on the claims, including places not examined or sampled by the mineral examiners.

United States v. Estate of Melvin E. Viles, Mary S. Viles, 126 IBLA 162 (May 10, 1993)

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

RULES OF PRACTICE--Continued

HEARINGS--Continued

Although authorized under 43 CFR 4.415, a fact-finding hearing will be ordered only when the record before the Board presents conflicting issues of fact that cannot be resolved on the basis of that record. Where appellant fails to submit all available evidence to the Board, it is not possible to conclude that the evidence is irreconcilable, and the request for hearing is properly denied.

Pine Grove Farms, 126 IBLA 269 (June 3, 1993)

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and BLM properly reviewed the same information submitted to this Board.

Sealaska Corp., 127 IBLA 22 (July 15, 1993)

Sealaska Corp., 127 IBLA 59 (July 20, 1993)

If the applicable statute does not expressly require a formal evidentiary hearing "on the record" and no contrary Congressional intent is evident, formal proceedings before an ALJ are not mandated. The language of 43 U.S.C. § 1732(c) (1988), allowing for revocation or suspension of a special recreation use permit after "notice and hearing," does not dictate a formal hearing before an ALJ, and a special recreation permittee's hearing rights under 43 U.S.C. § 1732(c) (1988), are satisfied when the permittee is given notice of BLM's adverse decision and afforded the right to appeal to the Interior Board of Land Appeals.

Dvorak Expeditions et al., 127 IBLA 145 (Aug. 25, 1993)

RULES OF PRACTICE--Continued

HEARINGS--Continued

A continuance of a hearing into the validity of a mining claim will only be granted where the mining claimant presents sufficient reason to justify the grant of an additional opportunity to present his case, i.e., where circumstances have placed a substantial constraint upon his ability to obtain or offer samples or other evidence of a discovery.

United States v. Mineco, United States v. Cyrus L. & Mary F. Colburn, United States v. Cache Properties,
127 IBLA 181 (Sept. 7, 1993)

PROTESTS

The time limits for protesting a proposed decision under 43 CFR 4160.2 and for filing an appeal of a final decision under 43 CFR 4160.3 and 4160.4 are mandatory. If a proposed decision is not protested within 15 days after it is received, it becomes a final decision without further notice and is then subject to appeal for 30 days.

William J. Thoman v. Bureau of Land Management, 125 IBLA 100 (Jan. 8, 1993)

Only an objection to an action proposed to be taken by BLM is cognizable as a protest under 43 CFR 4.450-2. An objection filed after BLM has taken action is an untimely protest. BLM properly dismisses a protest of an action that is not proposed to be taken but has already occurred.

Lazaro Mendieta, 126 IBLA 394 (July 6, 1993)

RULES OF PRACTICE--Continued

WITNESSES

An appraiser's interest in a case is a proper subject for cross-examination, however, a claim of bias on the part of an appraiser must be based on personal interest rather than employment.

An appraiser's training and experience are properly considered in determining the weight to be given testimony. When an appraisal lacks an analysis showing why a specific value was selected from a range of values, the ALJ who presides at a hearing is in the best position to decide the weight to be accorded the appraiser's testimony.

Richard Connie Nielson v. The Bureau of Land Management,
125 IBLA 353 (Mar. 30, 1993)

SECRETARY OF THE INTERIOR

(See also Administrative Authority)

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

Under the Secretary's memo dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by FWS pursuant to sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memo does

SECRETARY OF THE INTERIOR--Continued

not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988), with respect to any other issue pertaining to a grazing appeal.

Charles Lundgren et al. v. Bureau of Land Management, Natural Resources Defense Council, Sierra Club, & Desert Protective Council (Intervenor), 126 IBLA 238 (May 28, 1993)

SEGREGATION

Mining claims located on land segregated from appropriation under the mining law by a proposed classification decision made pursuant to 43 CFR 2741.4(h) (1985) are null and void ab initio.

Edgar Sebastian Roberts, 127 IBLA 217 (Sept. 21, 1993)

SODIUM LEASES AND PERMITS

(See also Mineral Leasing Act)

LEASES

The date of expiration of the permits is the critical date for determination of a discovery on sodium prospecting permits entitling the holder to the issuance of sodium preference right leases. Evidence concerning costs and market conditions after that date have relevance only to the extent they reflect what may have reasonably been anticipated at the expiration of the permits. Yankee Gulch Joint Venture v. BLM, 113 IBLA 106 (1990).

Where the Board has held that a hearing is required before an ALJ to determine whether a valuable deposit of sodium has been shown by a prospecting permittee applying for a preference right lease, evidence of the quantity and quality of the deposit is admissible to the

SODIUM LEASES AND PERMITS--Continued

LEASES--Continued

extent it tends to show whether the deposit can be mined, processed, and marketed at a profit. A prior stipulation by BLM as to the sufficiency of the initial showing as to quantity and quality will not preclude evidence on the quantity and quality of the deposit of sodium.

The test for determining whether a permittee has discovered a valuable deposit of sodium justifying issuance of a preference right lease is similar to the test for determining whether the locator of a mining claim under the 1872 Mining Law, 30 U.S.C. § 21 (1988), has discovered a valuable mineral deposit, i.e., whether the mineral deposit found within the limits of the claim is of such quantity and quality that a prudent person would be justified in the further expenditure of his labor and funds with a reasonable prospect of success in developing a paying mine. This standard has been further refined to include a showing of marketability, a reasonable expectation that the mineral can be extracted, processed, and marketed at a profit.

Bureau of Land Management v. Eugene Simons, 128 IBLA 99 (Dec. 20, 1993)

PERMITS

BLM properly rejected sodium prospecting permit applications for lands withdrawn from sodium leasing (except if the Secretary or his delegate should find that development of the sodium would not adversely affect oil shale values) when BLM concluded that additional information from operations on existing leases was needed to determine whether sodium production would significantly damage oil shale resources.

Harry E. McCarthy et al., 128 IBLA 36 (Nov. 16, 1993)

SODIUM LEASES AND PERMITS--Continued

PERMITS--Continued

The date of expiration of the permits is the critical date for determination of a discovery on sodium prospecting permits entitling the holder to the issuance of sodium preference right leases. Evidence concerning costs and market conditions after that date have relevance only to the extent they reflect what may have reasonably been anticipated at the expiration of the permits. Yankee Gulch Joint Venture v. BLM, 113 IBLA 106 (1990).

Where the Board has held that a hearing is required before an ALJ to determine whether a valuable deposit of sodium has been shown by a prospecting permittee applying for a preference right lease, evidence of the quantity and quality of the deposit is admissible to the extent it tends to show whether the deposit can be mined, processed, and marketed at a profit. A prior stipulation by BLM as to the sufficiency of the initial showing as to quantity and quality will not preclude evidence on the quantity and quality of the deposit of sodium.

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Bureau of Land Management v. Eugene Simons, 128 IBLA 99 (Dec. 20, 1993)

SODIUM LEASES AND PERMITS--Continued

PREFERENCE RIGHT LEASES

The date of expiration of the permits is the critical date for determination of a discovery on sodium prospecting permits entitling the holder to the issuance of sodium preference right leases. Evidence concerning costs and market conditions after that date have relevance only to the extent they reflect what may have reasonably been anticipated at the expiration of the permits. Yankee Gulch Joint Venture v. BLM, 113 IBLA 106 (1990).

Where the Board has held that a hearing is required before an ALJ to determine whether a valuable deposit of sodium has been shown by a prospecting permittee applying for a preference right lease, evidence of the quantity and quality of the deposit is admissible to the extent it tends to show whether the deposit can be mined, processed, and marketed at a profit. A prior stipulation by BLM as to the sufficiency of the initial showing as to quantity and quality will not preclude evidence on the quantity and quality of the deposit of sodium.

The text for determining whether a permittee has discovered a valuable deposit of sodium justifying issuance of a preference right lease is similar to the test for determining whether the locator of a mining claim under the 1872 Mining Law, 30 U.S.C. § 21 (1988), has discovered a valuable mineral deposit, i.e., whether the mineral deposit found within the limits of the claim is of such quantity and quality that a prudent person would be justified in the further expenditure of his labor and funds with a reasonable prospect of success in developing a paying mine. This standard has been further refined to include a showing of marketability, a reasonable expectation that the mineral can be extracted, processed, and marketed at a profit.

Bureau of Land Management v. Eugene Simons, 128 IBLA 99 (Dec. 20, 1993)

SPECIAL USE PERMITS

Where, in an appeal of a decision to issue an outfitter and guide permit to a third party for the 1990 season, the appellant seeks to raise issues relating to the original issuance in 1987 of such a permit to the third party in 1987, such a challenge is barred by the doctrine of administrative finality.

The issuance of a special recreation use permit to conduct commercial outfitter and guide services on public land is discretionary, and the Department may accept or reject a permit application in furtherance of the objectives, responsibilities, and programs for management of the public lands involved. In light of this discretionary authority, BLM may use such restrictions as deemed necessary, including the imposition of a moratorium on the issuance of such permits while it is developing a management plan for outfitter and guide services.

Keith Rush dba Rush's Lakeview Ranch, Kevin Rush,
125 IBLA 346 (Mar. 29, 1993)

BLM has the discretionary authority under 43 U.S.C. § 1732(b) (1988), and 43 CFR Subpart 8372 to issue special recreation use permits for commercial float boating operations and to set permit conditions. There must be a compelling reason for modification or reversal of an exercise of this discretionary authority, and the Board will affirm a decision exercising this authority if the decision is not arbitrary, capricious, or an abuse of discretion.

BLM may limit commercial jet back service during the peak summer use period to protect public safety. The fact that BLM was contemplating revisions to the recreation management plan concerning commercial jet back services when the restrictions were imposed did not render the imposition arbitrary, capricious, or an abuse of discretion.

The Exodus Corp., 126 IBLA 1 (Apr. 1, 1993)

SPECIAL USE PERMITS--Continued

Issuance of a special recreation permit for off-road vehicle tours over existing roads and trails may be affirmed on appeal where the record establishes that the potential impacts were carefully considered and protective stipulations and mitigating measures were applied to avoid significant adverse environmental impacts.

Eastern Sierra Audubon Society, 126 IBLA 222 (May 21, 1993)

Issuance of a special recreation permit is discretionary, and BLM properly rejects an application for a permit for an organized off-road motorcycle event when there is evidence that the event could result in significant impacts to sensitive wildlife species and would be inconsistent with the management objectives, responsibilities, or programs for the public lands involved.

Checker Motorcycle Club, 126 IBLA 251 (June 1, 1993)

If the applicable statute does not expressly require a formal evidentiary hearing "on the record" and no contrary Congressional intent is evident, formal proceedings before an ALJ are not mandated. The language of 43 U.S.C. § 1732(c) (1988), allowing for revocation or suspension of a special recreation use permit after "notice and hearing," does not dictate a formal hearing before an ALJ, and a special recreation permittee's hearing rights under 43 U.S.C. § 1732(c) (1988), are satisfied when the permittee is given notice of BLM's adverse decision and afforded the right to appeal to the Interior Board of Land Appeals.

Decisions imposing sanctions for violation of permit terms, waiving permit terms, or excusing noncompliance will be upheld unless it is shown that the decision was arbitrary, capricious, or based upon a mistake of fact or law.

A special recreation permit holder is subject to any permit condition or stipulation BLM deems necessary

SPECIAL USE PERMITS--Continued

to protect the public interests. If BLM notifies a permittee of sanctions for failure to comply, it may invoke those sanctions upon noncompliance.

BLM has the discretionary authority to invoke penalties for a pattern of violation of a recreational use permit stipulation by placing a permittee on probationary status. However, the record must demonstrate a pattern of stipulation violations, the number and the relative severity of those violations, and a basis for selecting the chosen remedy.

Dvorak Expeditions et al., 127 IBLA 145 (Aug. 25, 1993)

STATE EXCHANGES

(See also Exchanges of Land)

GENERALLY

Regulations governing state land exchanges under sec. 8 of the Taylor Grazing Act required publication of notice in local newspapers providing an opportunity to protest the exchange application. Where the record discloses exchanges were not protested and were approved by a final decision, the doctrine of administrative finality precludes review of the propriety of the terms of the conveyances at the behest of a mining claimant who located claims on the lands more than 40 years later.

UOP, 127 IBLA 105 (Aug. 9, 1993)

STATE EXCHANGES--Continued

LANDS SUBJECT TO

Regulations governing state land exchanges under sec. 8 of the Taylor Grazing Act required publication of notice in local newspapers providing an opportunity to protest the exchange application. Where the record discloses exchanges were not protested and were approved by a final decision, the doctrine of administrative finality precludes review of the propriety of the terms of the conveyances at the behest of a mining claimant who located claims on the lands more than 40 years later.

UOP, 127 IBLA 105 (Aug. 9, 1993)

STATE GRANTS

In sec. 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a) (1988), Congress codified its power to reserve tideland from a state's equal footing entitlement when a state enters the Union by specifically excluding from operation of that Act "all lands expressly retained by or ceded to the United States when the State entered the Union * * * and any rights the United States has in lands presently and actually occupied by the United States under claim of right."

The Supreme Court has articulated a two-pronged test to determine whether a Federal reservation of public land defeats a state's equal footing entitlement: (1) that Congress clearly intended to include land beneath navigable waters (or tideland) within the reservation and (2) affirmatively intended to defeat future state title to such land.

The reservation of the power of exclusive legislation in sec. 11(b) of the Alaska Statehood Act is expressly predicated on the fact of continued Federal ownership of parcels held for Coast Guard purposes, and Congress intended to retain ownership over tidelands

STATE GRANTS--Continued

reserved for lighthouse purposes by defeating the State's equal footing entitlement.

State of Alaska, 127 IBLA 317 (Oct. 13, 1993)

STATE LANDS

In sec. 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a) (1988), Congress codified its power to reserve tideland from a state's equal footing entitlement when a state enters the Union by specifically excluding from operation of that Act "all lands expressly retained by or ceded to the United States when the State entered the Union * * * and any rights the United States has in lands presently and actually occupied by the United States under claim of right."

The Supreme Court has articulated a two-pronged test to determine whether a Federal reservation of public land defeats a state's equal footing entitlement: (1) that Congress clearly intended to include land beneath navigable waters (or tideland) within the reservation and (2) affirmatively intended to defeat future state title to such land.

The reservation of the power of exclusive legislation in sec. 11(b) of the Alaska Statehood Act is expressly predicated on the fact of continued Federal ownership of parcels held for Coast Guard purposes, and Congress intended to retain ownership over tidelands reserved for lighthouse purposes by defeating the State's equal footing entitlement.

State of Alaska, 127 IBLA 317 (Oct. 13, 1993)

STATUTE OF LIMITATIONS

A statute establishing time limitations for the commencement of judicial actions for damages on behalf of the U.S. does not limit administrative proceedings within the DOI.

Quality Broadcasting Corp., Unicom Broadcasting, Inc.,
126 IBLA 174 (May 11, 1993)

STATUTES

Self-executing legislation contains the standards necessary for its enforcement without the need for implementing regulations.

White Earth Band of Chippewa Indians v. Minneapolis Area
Director, Bureau of Indian Affairs, 23 IBIA 216 (Mar. 3,
1993)

STATUTORY CONSTRUCTION

ADMINISTRATIVE CONSTRUCTION

Courts commonly give deference to the construction of a statute by the agency charged with its administration, particularly one which was contemporaneous with the statute and has been consistently followed by the agency.

Hopi Tribe v. Director, Office of Trust Responsibil-
ities, Bureau of Indian Affairs, 24 IBIA 65 (June 22,
1993)

STATUTORY CONSTRUCTION--Continued

ADMINISTRATIVE CONSTRUCTION--Continued

In order to correct prior error, an official of the BIA may change an administrative interpretation of a statute as long as the reason for the change is clearly set forth to show that the departure from the prior administrative position is not arbitrary or capricious.

Naegle Outdoor Advertising Co. v. Acting Sacramento Area Director, Bureau of Indian Affairs, 24 IBIA 169 (Aug. 31, 1993)

IMPLIED REPEALS

Absent convincing evidence, the Board cannot conclude that the requirement for approval of tribal legislation in sec. 28 of the Five Tribes Act of Apr. 26, 1906, 34 Stat. 137, was impliedly repealed by the Oklahoma Indian Welfare Act, 25 U.S.C. § 503 (1988).

Seminole Nation of Oklahoma v. Acting Director, Office of Tribal Services, Bureau of Indian Affairs, 24 IBIA 209 (Sept. 23, 1993)

INDIANS

Absent convincing evidence, the Board cannot conclude that the requirement for approval of tribal legislation in sec. 28 of the Five Tribes Act of Apr. 26, 1906, 34 Stat. 137, was impliedly repealed by the Oklahoma Indian Welfare Act, 25 U.S.C. § 503 (1988).

Seminole Nation of Oklahoma v. Acting Director, Office of Tribal Services, Bureau of Indian Affairs, 24 IBIA 209 (Sept. 23, 1993)

STOCK-RAISING HOMESTEADS

(See also Homesteads (Ordinary))

Under Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983), gravel is a mineral reserved to the U.S. by sec. 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1988). When an Indian tribe receives title to minerals reserved under this provision, it receives title to the reserved gravel.

Sampsel J. Bitz v. Acting Billings Area Director, Bureau of Indian Affairs, 23 IBIA 286 (Apr. 6, 1993)

A right to select lieu lands under the authority of sec. 13 of the Act of Mar. 13, 1921, 41 Stat. 1239, was a claim required to be recorded with the Department within 2 years from the effective date of the Act of Aug. 5, 1955, 69 Stat. 534. Failure to present the claim within the time established by the 1955 Recordation Act barred acquisition of the land. Filing a selection application in 1946 did not constitute compliance with the 1955 recordation requirement.

Tommy Chavez, 127 IBLA 395 (Nov. 2, 1993)

SUBMERGED LANDS

In sec. 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a) (1988), Congress codified its power to reserve tideland from a state's equal footing entitlement when a state enters the Union by specifically excluding from operation of that Act "all lands expressly retained by or ceded to the United States when the State entered the Union * * * and any rights the United States has in lands presently and actually occupied by the United States under claim of right."

The Supreme Court has articulated a two-pronged test to determine whether a Federal reservation of public land defeats a state's equal footing entitlement: (1) that Congress clearly intended to include land

SUBMERGED LANDS--Continued

beneath navigable waters (or tideland) within the reservation and (2) affirmatively intended to defeat future state title to such land.

The reservation of the power of exclusive legislation in sec. 11(b) of the Alaska Statehood Act is expressly predicated on the fact of continued Federal ownership of parcels held for Coast Guard purposes, and Congress intended to retain ownership over tidelands reserved for lighthouse purposes by defeating the State's equal footing entitlement.

State of Alaska, 127 IBLA 317 (Oct. 13, 1993)

SUBMERGED LANDS ACT

GENERALLY

In sec. 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a) (1988), Congress codified its power to reserve tideland from a state's equal footing entitlement when a state enters the Union by specifically excluding from operation of that Act "all lands expressly retained by or ceded to the United States when the State entered the Union * * * and any rights the United States has in lands presently and actually occupied by the United States under claim of right."

State of Alaska, 127 IBLA 317 (Oct. 13, 1993)

STATE LAWS

In sec. 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a) (1988), Congress codified its power to reserve tideland from a state's equal footing entitlement when a state enters the Union by specifically excluding from operation of that Act "all lands expressly retained by or ceded to the United States when the State entered the

SUBMERGED LANDS ACT--Continued

STATE LAWS--Continued

Union * * * and any rights the United States has in lands presently and actually occupied by the United States under claim of right."

State of Alaska, 127 IBLA 317 (Oct. 13, 1993)

STATE SOVEREIGNTY

In sec. 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a) (1988), Congress codified its power to reserve tideland from a state's equal footing entitlement when a state enters the Union by specifically excluding from operation of that Act "all lands expressly retained by or ceded to the United States when the State entered the Union * * * and any rights the United States has in lands presently and actually occupied by the United States under claim of right."

State of Alaska, 127 IBLA 317 (Oct. 13, 1993)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

GENERALLY

One element for invoking estoppel is that the person asserting it must be ignorant of the true facts. Where appellant had constructive knowledge of regulation 30 CFR 701.5 and the conditions under which the Virginia program obtained primacy, which included the requirement to conform to 30 CFR 701.5, and where appellant had actual knowledge that OSM would require reclamation in accordance with applicable program

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

GENERALLY--Continued

standards, appellant cannot be said to be ignorant of the true facts.

Silica Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 191 (May 13, 1993)

Sec. 522(e) of SMCRA, 30 U.S.C. § 1271(e), prohibits only "surface coal mining operations, within areas designated by Congress for special protection, subject to certain exceptions. Since subsidence is not included in the term "surface coal mining operations," subsidence is not prohibited by sec. 522(e).

Applicability of Sec. 522(e) of the Surface Mining Control & Reclamation Act to Subsidence, M-36971 (July 10, 1991) 100 I.D. 85

ADMINISTRATIVE PROCEDURE

Generally

A settlement agreement is properly approved if the settlement is fair, adequate, reasonable, and appropriate under the particular facts. The Board will affirm an ALJ's approval of a settlement unless the objecting party demonstrates that the Judge made a harmful error of law or a meaningful error in judgment. In evaluating the appropriateness of a settlement agreement, deference should be paid to the judgment of the Government agency which has proposed and submitted the compromise.

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, The Hopi Tribe, Maxine Kescoli, & The Navajo Nation (Intervenors), 125 IBLA 107 (Jan. 14, 1993)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Generally--Continued

When as a result of a citizen's complaint the state regulatory authority is notified by OSM in a TDN that there is a dispute regarding whether a state permittee has a legal right to mine private land subject to permit but the state refuses within 10 days of receipt thereof to suspend mining under the permit pending resolution of that dispute, OSM should direct suspension of mining.

Marion A. Taylor, 125 IBLA 271 (Feb. 19, 1993)

Burden of Proof

An operator challenging OSM's jurisdiction on the basis that its mining activities fall within the 2-acre exemption under SMCRA bears the burden of affirmatively demonstrating entitlement to the exemption.

Silica Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 191 (May 13, 1993)

Under 30 CFR 700.11(b), a surface coal mining and reclamation operation is not exempt from regulation under SMCRA where that operation, together with any "related" operation, has or will have an affected area of 2 or more acres. Where OSM issues COs for two mine sites on the basis of relatedness, but during the review proceeding it is admitted that each site is more than 2 acres, the necessity to make a relatedness determination in order to sustain the enforcement action is negated.

Where OSM's abatement requirement for a CO includes elimination of a highwall, but the evidence at a review hearing shows that the highwall predated the surface coal mining operation and OSM fails to show that the mining operation resulted in any adverse physical impact

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Burden of Proof--Continued

on that pre-existing highwall, elimination of that highwall may not be required.

Barwick Coal Co., Inc., 127 IBLA 86 (July 23, 1993)

Issuance of a NOV will be affirmed only where OSM makes a prima facie case by presenting evidence sufficient to establish facts essential to justify a finding that there were violations of SMCRA as alleged in the NOV.

Delmar Adkins v. Office of Surface Mining Reclamation & Enforcement, 128 IBLA 1 (Nov. 2, 1993)

APPEALS

Generally

Where, consistent with the provisions of 30 CFR 700.11(d)(1), a state has made a written determination that reclamation has been fully completed at an interim permit site pursuant to Subchapter B of Chapter 7 of Title 30 and the period of extended liability for revegetation has run, OSM may not assert jurisdiction absent a showing that the written determination was based upon fraud, collusion, or a misrepresentation of a material fact.

Appollo Fuels, Inc. v. Office of Surface Mining Reclamation and Enforcement, 125 IBLA 369 (Mar. 31, 1993)

100 I.D. 63

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ATTORNEY FEES/COSTS AND EXPENSES

Standards for Award

In order for one who participates in an administrative proceeding reviewing an enforcement action to receive an award of costs and expenses under 43 CFR 4.1294(a)(1), there must be a determination that (1) a violation of the Act, regulations, or permit has occurred, or that an imminent hazard existed; (2) the participant made a substantial contribution to the full and fair determination of the issues; and (3) the contribution was separate and distinct from the contribution made by the person initiating the proceeding.

Where a participating party seeking an award of costs and expenses, including attorneys' fees, under 43 CFR 4.1294(a)(1), alleges that it made a separate and distinct contribution but fails to describe with specificity what that separate and distinct contribution was and the case record does not demonstrate such a contribution, the request for an award will be denied.

Where the contribution of an intervenor is different than that of OSM, it still may not be considered "separate and distinct" under 43 CFR 4.1294(a)(1), when that contribution relates to a subsidiary issue that is decided favorably to the permittee, and the intervenor's contribution to the ultimate issue for resolution is minimal or merely cumulative to that of OSM.

Where a person intervenes in support of OSM in an administrative proceeding reviewing an enforcement action, and, thereafter, takes a position opposed to OSM, that person must be a prevailing party on that issue in order to be eligible for an award of costs and expenses, including attorneys' fees, for that issue from the permittee under 43 CFR 4.1294(a)(1).

Save Our Cumberland Mountains, Bledsoe County Chapter,
127 IBLA 245 (Sept. 28, 1993)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

ATTORNEY FEES/COSTS AND EXPENSES--Continued

Substantial Contribution

Where a participating party seeking an award of costs and expenses, including attorneys' fees, under 43 CFR 4.1294(a)(1), alleges that it made a separate and distinct contribution but fails to describe with specificity what that separate and distinct contribution was and the case record does not demonstrate such a contribution, the request for an award will be denied.

Where the contribution of an intervenor is different than that of OSM, it still may not be considered "separate and distinct" under 43 CFR 4.1294(a)(1), when that contribution relates to a subsidiary issue that is decided favorably to the permittee, and the intervenor's contribution to the ultimate issue for resolution is minimal or merely cumulative to that of OSM.

Save Our Cumberland Mountains, Bledsoe County Chapter,
127 IBLA 245 (Sept. 28, 1993)

BACKFILLING AND GRADING REQUIREMENTS

Highwall Elimination

Where OSM's abatement requirement for a CO includes elimination of a highwall, but the evidence at a review hearing shows that the highwall predated the surface coal mining operation and OSM fails to show that the mining operation resulted in any adverse physical impact on that pre-existing highwall, elimination of that highwall may not be required.

Barwick Coal Co., Inc., 127 IBLA 86 (July 23, 1993)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

BONDS

Release of

Where, consistent with the provisions of 30 CFR 700.11(d)(1), a state has made a written determination that reclamation has been fully completed at an interim permit site pursuant to Subchapter B of Chapter 7 of Title 30 and the period of extended liability for revegetation has run, OSM may not assert jurisdiction absent a showing that the written determination was based upon fraud, collusion, or a misrepresentation of a material fact.

Appollo Fuels, Inc. v. Office of Surface Mining Reclamation and Enforcement, 125 IBLA 369 (Mar. 31, 1993)
100 I.D. 63

CESSATION ORDERS

Generally

The fact that the primary regulatory responsibility for enforcement of surface coal mining reclamation operations has been assumed by a state under sec. 503 of SMCRA does not oust OSM of jurisdiction to issue a CO where an oversight inspection discloses the existence of a violation which can be expected to create significant, imminent environmental harm.

The doctrines of collateral estoppel and res judicata will not preclude OSM from issuing its own CO in situations where the violation which is the basis of the CO was cited and litigated by a state regulatory authority because the statutory scheme of sec. 521(a)(2) of SMCRA mandates issuance of a CO in such a situation where the Federal oversight inspection discloses an unabated violation which is causing or can be expected to cause imminent environmental harm.

The doctrines of res judicata or collateral estoppel do not ordinarily preclude review of a CO

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CESSATION ORDERS--Continued

Generally--Continued

issued by OSM for operations conducted without a valid permit where the state regulatory agency agreed to a settlement of the same violation which did not require performance of the reclamation mandated by law. OSM is neither a party to the case nor in privity with the state regulatory agency where the latter adopts a position inconsistent with that required by OSM.

Triple R Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 310 (June 16, 1993)

The doctrines of collateral estoppel and res judicata will not preclude OSM from issuing its own CO in a situation where a similar order for the same violation was issued and litigated by a state regulatory authority because the statutory scheme of SMCRA evidences a countervailing statutory policy against application of those doctrines in such a situation.

Ron Deaton/Barwick Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 320 (June 16, 1993)

Under 30 CFR 700.11(b), a surface coal mining and reclamation operation is not exempt from regulation under SMCRA where that operation, together with any "related" operation, has or will have an affected area of 2 or more acres. Where OSM issues COs for two mine sites on the basis of relatedness, but during the review proceeding it is admitted that each site is more than 2 acres, the necessity to make a relatedness determination in order to sustain the enforcement action is negated.

If a question arises concerning who is responsible for compliance with the Act and regulations at the site of a surface coal mining operation, it is proper for an OSM inspector issuing a NOV or a CO to name all parties

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CESSATION ORDERS--Continued

Generally--Continued

who may be responsible. If a party challenges the notice or order on the basis that it is not a responsible party, OSM bears the burden of going forward to establish that the challenging party is responsible. The challenging party then bears the ultimate burden of persuasion by a preponderance of the evidence that it is not responsible for the cited violation.

Where OSM's abatement requirement for a CO includes elimination of a highwall, but the evidence at a review hearing shows that the highwall predated the surface coal mining operation and OSM fails to show that the mining operation resulted in any adverse physical impact on that pre-existing highwall, elimination of that highwall may not be required.

Barwick Coal Co., Inc., 127 IBLA 86 (July 23, 1993)

CITIZEN COMPLAINTS

Generally

When as a result of a citizen's complaint the state regulatory authority is notified by OSM in a TDN that there is a dispute regarding whether a state permittee has a legal right to mine private land subject to permit but the state refuses within 10 days of receipt thereof to suspend mining under the permit pending resolution of that dispute, OSM should direct suspension of mining.

Marion A. Taylor, 125 IBLA 271 (Feb. 19, 1993)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ENFORCEMENT PROCEDURES

Generally

Where, consistent with the provisions of 30 CFR 700.11(d)(1), a state has made a written determination that reclamation has been fully completed at an interim permit site pursuant to Subchapter B of Chapter 7 of Title 30 and the period of extended liability for revegetation has run, OSM may not assert jurisdiction absent a showing that the written determination was based upon fraud, collusion, or a misrepresentation of a material fact.

Appollo Fuels, Inc. v. Office of Surface Mining Reclamation and Enforcement, 125 IBLA 369 (Mar. 31, 1993)
100 I.D. 63

Since the initial definition of "affected area" promulgated in Mar. 1979, the intent of the Federal law has been to include surface areas above underground workings as "affected areas" within the meaning of the Act. The Virginia program was approved on Dec. 15, 1981, on the condition that it define "affected area" to include that land overlying underground mine workings. States are not permitted to modify their programs without the Secretary's approval. 30 CFR 732.17(g). Where a mining operation under the jurisdiction of Virginia reclamation authorities included a surface disturbance of 1.65 acres and an underground "shadow" disturbance of 19.2 acres, the area affected is greater than 2 acres; the operator therefore is required to reclaim the area in accordance with applicable program standards for minesites in excess of 2 acres.

Silica Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 191 (May 13, 1993)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ENFORCEMENT PROCEDURES--Continued

Generally--Continued

OSM properly issued a NOV to a surface coal mine operator in a state where the principal authority to regulate such mining was exercised by state authorities when a Federal inspection established a continuing violation of SMCRA and applicable state law and state authorities refused to take corrective action after notice was given to them of the violation of the state program.

Consolidation Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 127 IBLA 192 (Sept. 14, 1993)

EVIDENCE

Generally

Where, consistent with the provisions of 30 CFR 700.11(d)(1), a state has made a written determination that reclamation has been fully completed at an interim permit site pursuant to Subchapter B of Chapter 7 of Title 30 and the period of extended liability for revegetation has run, OSM may not assert jurisdiction absent a showing that the written determination was based upon fraud, collusion, or a misrepresentation of a material fact.

Appolo Fuels, Inc. v. Office of Surface Mining Reclamation and Enforcement, 125 IBLA 369 (Mar. 31, 1993)
100 I.D. 63

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

EVIDENCE--Continued

Generally--Continued

Issuance of a NOV will be affirmed only where OSM makes a prima facie case by presenting evidence sufficient to establish facts essential to justify a finding that there were violations of SMCRA as alleged in the NOV.

Delmar Adkins v. Office of Surface Mining Reclamation & Enforcement, 128 IBLA 1 (Nov. 2, 1993)

EXEMPTIONS

2-Acre

Until its amendment in 1987, sec. 528(2) of SMCRA, 30 U.S.C. § 1278(2) (1988), provided that SMCRA would not apply to the extraction of coal for commercial purposes where the surface mining operation affected 2 acres or less. "Affected area" as defined by 30 CFR 701.5 includes "the area located above underground workings."

An operator challenging OSM's jurisdiction on the basis that its mining activities fall within the 2-acre exemption under SMCRA bears the burden of affirmatively demonstrating entitlement to the exemption.

Since the initial definition of "affected area" promulgated in Mar. 1979, the intent of the Federal law has been to include surface areas above underground workings as "affected areas" within the meaning of the Act. The Virginia program was approved on Dec. 15, 1981, on the condition that it define "affected area" to include that land overlying underground mine workings. States are not permitted to modify their programs without the Secretary's approval. 30 CFR 732.17(g). Where a mining operation under the jurisdiction of Virginia reclamation authorities included a surface disturbance of 1.65 acres and an underground "shadow" disturbance of

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

EXEMPTIONS--Continued

2-Acre--Continued

19.2 acres, the area affected is greater than 2 acres; the operator therefore is required to reclaim the area in accordance with applicable program standards for minesites in excess of 2 acres.

Silica Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 191 (May 13, 1993)

The fact that the primary regulatory responsibility for enforcement of surface coal mining reclamation operations has been assumed by a state under sec. 503 of SMCRA does not oust OSM of jurisdiction to issue a CO where an oversight inspection discloses the existence of a violation which can be expected to create significant, imminent environmental harm.

Triple R Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 310 (June 16, 1993)

Where a permittee operating pursuant to a state 2-acre permit receives authorization from a state inspector to reclaim an adjacent previously mined area, those two sites cannot be considered related under 30 CFR 700.11(b)(2), where there is no evidence that they were mined within 12 months of one another or that they were under common ownership and control.

Where a permittee operating pursuant to a state 2-acre permit receives authorization from a state inspector to reclaim an adjacent previously mined area, that previously mined area will not be considered part of the "affected area," as defined in 30 CFR 701.5, where the reclamation undertaken thereon was not

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

EXEMPTIONS--Continued

2-Acre--Continued

necessary or incidental to the permittee's surface coal mining operation.

Hearsay evidence is admissible in an administrative proceeding reviewing issuance by OSM of a CO for exceeding the acreage limitations of a 2-acre permit, if it is relevant and material, and may constitute "substantial evidence" within the meaning of 5 U.S.C. § 706(2)(E) (1988), if it is reliable and probative. However, where such evidence is the sole basis for issuance of the CO, a multifactor analysis is used to assure its reliability, and when such evidence fails to withstand such analysis, the CO cannot be sustained.

Ron Deaton/Barwick Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 320 (June 16, 1993)

Under 30 CFR 700.11(b), a surface coal mining and reclamation operation is not exempt from regulation under SMCRA where that operation, together with any "related" operation, has or will have an affected area of 2 or more acres. Where OSM issues COs for two mine sites on the basis of relatedness, but during the review proceeding it is admitted that each site is more than 2 acres, the necessity to make a relatedness determination in order to sustain the enforcement action is negated.

Barwick Coal Co., Inc., 127 IBLA 86 (July 23, 1993)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

INSPECTIONS

10-day Notice to State

OSM properly issued a NOV to a surface coal mine operator in a state where the principal authority to regulate such mining was exercised by state authorities when a Federal inspection established a continuing violation of SMCRA and applicable state law and state authorities refused to take corrective action after notice was given to them of the violation of the state program.

Consolidation Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 127 IBLA 192 (Sept. 14, 1993)

When, despite an applicable interim program regulatory requirement that all highwalls be completely eliminated, a state erroneously determined that a surface coal mine operator who failed to totally eliminate a disturbed pre-existing highwall listed as a violation in a 10-day notice issued by OSM had, nonetheless, satisfactorily reclaimed the highwall because insufficient available spoil existed to completely eliminate it, the state's response to the 10-day notice based on such an erroneous reclamation determination did not constitute appropriate action designed to secure abatement of the violation, and OSM properly issued an NOV requiring complete elimination of the disturbed highwall.

Delmar Adkins v. Office of Surface Mining Reclamation & Enforcement, 128 IBLA 1 (Nov. 2, 1993)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

NOTICES OF VIOLATION

Generally

The Act makes no distinction between pre-existing and newly created areas of a mine. The determining factor is whether the area is used in conjunction with a present mining operation. Where a mining operator has been issued an NOV for failure to restore a load-out area to approximate original contour in violation of 30 CFR 717.14, and where the record establishes that the operator created the load-out area at the base of a pre-existing highwall and the newly created load-out area to approximate original contour will be affirmed on appeal.

Silica Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 191 (May 13, 1993)

When, despite an applicable interim program regulatory requirement that all highwalls be completely eliminated, a state erroneously determined that a surface coal mine operator who failed to totally eliminate a disturbed pre-existing highwall listed as a violation in a 10-day notice issued by OSM had, nonetheless, satisfactorily reclaimed the highwall because insufficient available spoil existed to completely eliminate it, the state's response to the 10-day notice based on such an erroneous reclamation determination did not constitute appropriate action designed to secure abatement of the violation, and OSM properly issued an NOV requiring complete elimination of the disturbed highwall.

Issuance of a NOV will be affirmed only where OSM makes a prima facie case by presenting evidence sufficient to establish facts essential to justify a finding that there were violations of SMCRA as alleged in the NOV.

Delmar Adkins v. Office of Surface Mining Reclamation & Enforcement, 128 IBLA 1 (Nov. 2, 1993)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

NOTICES OF VIOLATION--Continued

Permittees

If a question arises concerning who is responsible for compliance with the Act and regulations at the site of a surface coal mining operation, it is proper for an OSM inspector issuing a NOV or a CO to name all parties who may be responsible. If a party challenges the notice or order on the basis that it is not a responsible party, OSM bears the burden of going forward to establish that the challenging party is responsible. The challenging party then bears the ultimate burden of persuasion by a preponderance of the evidence that it is not responsible for the cited violation.

Barwick Coal Co., Inc., 127 IBLA 86 (July 23, 1993)

PERMITS

Generally

A settlement agreement is properly approved if the settlement is fair, adequate, reasonable, and appropriate under the particular facts. The Board will affirm an ALJ's approval of a settlement unless the objecting party demonstrates that the Judge made a harmful error of law or a meaningful error in judgment. In evaluating the appropriateness of a settlement agreement, deference should be paid to the judgment of the Government agency which has proposed and submitted the compromise.

OSM has the authority, pursuant to SMCRA's prohibition against mining within 100 feet of a cemetery, 30 U.S.C. § 1272(e)(5) (1988), to require a permit applicant to submit additional information concerning the probability of locating undiscovered prehistoric burials in the permit area and to propose means to avoid disturbing such sites. However, if that information is necessary to support the written finding required by 30 U.S.C. § 1260(b)(4) (1988), that no mining will occur

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

PERMITS--Continued

Generally--Continued

in an area designated unsuitable for surface mining, such data must be obtained before permit approval. OSM's attempt to base the required finding upon information to be received after permit issuance by the imposition of special conditions to the permit violates 30 U.S.C. § 1260(b)(1) and (4) (1988).

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, The Hopi Tribe, Maxine Kescoll, & The Navajo Nation (Intervenors), 125 IBLA 107 (Jan. 14, 1993)

When as a result of a citizen's complaint the state regulatory authority is notified by OSM in a TDN that there is a dispute regarding whether a state permittee has a legal right to mine private land subject to permit but the state refuses within 10 days of receipt thereof to suspend mining under the permit pending resolution of that dispute, OSM should direct suspension of mining.

Marion A. Taylor, 125 IBLA 271 (Feb. 19, 1993)

Approval

A settlement agreement is properly approved if the settlement is fair, adequate, reasonable, and appropriate under the particular facts. The Board will affirm an ALJ's approval of a settlement unless the objecting party demonstrates that the Judge made a harmful error of law or a meaningful error in judgment. In evaluating the appropriateness of a settlement agreement, deference should be paid to the judgment of the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

PERMITS--Continued

Approval--Continued

Government agency which has proposed and submitted the compromise.

OSM has the authority, pursuant to SMCRA's prohibition against mining within 100 feet of a cemetery, 30 U.S.C. § 1272(e)(5) (1988), to require a permit applicant to submit additional information concerning the probability of locating undiscovered prehistoric burials in the permit area and to propose means to avoid disturbing such sites. However, if that information is necessary to support the written finding required by 30 U.S.C. § 1260(b)(4) (1988), that no mining will occur in an area designated unsuitable for surface mining, such data must be obtained before permit approval. OSM's attempt to base the required finding upon information to be received after permit issuance by the imposition of special conditions to the permit violates 30 U.S.C. § 1260(b)(1) and (4) (1988).

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, The Hopi Tribe, Maxine Kescoli, & The Navajo Nation (Intervenors), 125 IBLA 107 (Jan. 14, 1993)

PREVIOUSLY MINED LANDS

Generally

The Act makes no distinction between pre-existing and newly created areas of a mine. The determining factor is whether the area is used in conjunction with a present mining operation. Where a mining operator has been issued an NOV for failure to restore a load-out area to approximate original contour in violation of 30 CFR 717.14, and where the record establishes that the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

PREVIOUSLY MINED LANDS--Continued

Generally--Continued

operator created the load-out area at the base of a pre-existing highwall and the newly created load-out area to approximate original contour will be affirmed on appeal.

Silica Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 191 (May 13, 1993)

Where a permittee operating pursuant to a state 2-acre permit receives authorization from a state inspector to reclaim an adjacent previously mined area, those two sites cannot be considered related under 30 CFR 700.11(b)(2), where there is no evidence that they were mined within 12 months of one another or that they were under common ownership and control.

Where a permittee operating pursuant to a state 2-acre permit receives authorization from a state inspector to reclaim an adjacent previously mined area, that previously mined area will not be considered part of the "affected area," as defined in 30 CFR 701.5, where the reclamation undertaken thereon was not necessary or incidental to the permittee's surface coal mining operation.

Ron Deaton/Barwick Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 320 (June 16, 1993)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

STATE PROGRAM

Generally

Under SMCRA, a state with an approved state program has primary responsibility for enforcing its state standards, but OSM, in an oversight role, has the responsibility of enforcing those same standards on a mine-by-mine basis, if the state fails to do so. Where OSM determines during an inspection that the operator is mining without a valid surface coal mining permit, 30 CFR 843.11(a)(2) requires that OSM issue a CO because mining without such a permit itself constitutes a practice which causes or can reasonably be expected to cause significant, imminent environmental harm.

Ron Deaton/Barwick Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 320 (June 16, 1993)

10-day Notice to State

When as a result of a citizen's complaint the state regulatory authority is notified by OSM in a TDN that there is a dispute regarding whether a state permittee has a legal right to mine private land subject to permit but the state refuses within 10 days of receipt thereof to suspend mining under the permit pending resolution of that dispute, OSM should direct suspension of mining.

Marion A. Taylor, 125 IBLA 271 (Feb. 19, 1993)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

STATE REGULATION

Generally

Since the initial definition of "affected area" promulgated in Mar. 1979, the intent of the Federal law has been to include surface areas above underground workings as "affected areas" within the meaning of the Act. The Virginia program was approved on Dec. 15, 1981, on the condition that it define "affected area" to include that land overlying underground mine workings. States are not permitted to modify their programs without the Secretary's approval. 30 CFR 732.17(g). Where a mining operation under the jurisdiction of Virginia reclamation authorities included a surface disturbance of 1.65 acres and an underground "shadow" disturbance of 19.2 acres, the area affected is greater than 2 acres; the operator therefore is required to reclaim the area in accordance with applicable program standards for minesites in excess of 2 acres.

Silica Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 191 (May 13, 1993)

The doctrines of collateral estoppel and res judicata will not preclude OSM from issuing its own CO in situations where the violation which is the basis of the CO was cited and litigated by a state regulatory authority because the statutory scheme of sec. 521(a)(2) of SMCRA mandates issuance of a CO in such a situation where the Federal oversight inspection discloses an unabated violation which is causing or can be expected to cause imminent environmental harm.

The doctrines of res judicata or collateral estoppel do not ordinarily preclude review of a CO issued by OSM for operations conducted without a valid permit where the state regulatory agency agreed to a settlement of the same violation which did not require performance of the reclamation mandated by law. OSM is neither a party to the case nor in privity with the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

STATE REGULATION--Continued

Generally--Continued

state regulatory agency where the latter adopts a position inconsistent with that required by OSM.

Triple R Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 310 (June 16, 1993)

Under SMCRA, a state with an approved state program has primary responsibility for enforcing its state standards, but OSM, in an oversight role, has the responsibility of enforcing those same standards on a mine-by-mine basis, if the state fails to do so. Where OSM determines during an inspection that the operator is mining without a valid surface coal mining permit, 30 CFR 843.11(a)(2) requires that OSM issue a CO because mining without such a permit itself constitutes a practice which causes or can reasonably be expected to cause significant, imminent environmental harm.

The doctrines of collateral estoppel and res judicata will not preclude OSM from issuing its own CO in a situation where a similar order for the same violation was issued and litigated by a state regulatory authority because the statutory scheme of SMCRA evidences a countervailing statutory policy against application of those doctrines in such a situation.

Ron Deaton/Barwick Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 126 IBLA 320 (June 16, 1993)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

WORDS AND PHRASES

"Surface Coal Mining Operations." This term is defined in sec. 701(28)(a) of SMCRA, 30 U.S.C. § 1291(28)(a). The most sound parsing of that paragraph is that it includes only surface coal mine and surface activities connected with those surface operations and surface impacts that are incident to an underground mine that are subject to sec. 516. Under this construction, subsidence is not included within the term "surface coal mining operations," because subsidence is not an activity conducted on the surface of lands. However, subsidence is still specifically regulated under sec. 516 of SMCRA.

Applicability of Sec. 522(e) of the Surface Mining Control & Reclamation Act to Subsidence, M-36971 (July 10, 1991) 100 I.D. 85

SURFACE RESOURCES ACT
(See also Hearings, Mining Claims)

OCCUPANCY

Sec. 4(a) of the Surface Resources Act, 30 U.S.C. § 612(a) (1988), bars use of an unpatented mining claim for any purpose other than prospecting, mining, or processing operations and uses "reasonably incident thereto." Residential occupancy may be reasonably incident to mining during the conduct of operations where required to provide feasible access to remote claims and/or to provide security for equipment and material at times when operations are ongoing. These needs are obviated, however, and residential occupancy may not be reasonably incident where the claimant owns fee lands contiguous with the claim which both provide and control vehicular access to the claim and from which claimant operates a tourist shop.

SURFACE RESOURCES ACT--Continued

OCCUPANCY--Continued

Storage on an unpatented mining claim of numerous inoperable (junk) automobiles and trucks is not reasonably incidental to mining even though some cannibalized parts from those vehicles may potentially have utility. Similarly, storage on the claim of more dump trucks than the record establishes can reasonably be used in claimant's mining operation is not reasonably incidental to mining.

Occupancy of an unpatented mining claim is properly regulated to bar any unnecessary and undue degradation of the public lands as set forth in sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988). The accumulation of an excessive quantity of parts and materials stored in a disorganized manner on the surface of an unpatented mining claim causing a surface disturbance greater than would normally result when mining is performed by a prudent operator in usual, customary, and proficient operations of similar character gives rise to unnecessary and undue degradation of the public lands.

The conduct of operations on an unpatented mining claim under an approved plan of operations may be conditioned upon provision of a bond adequate to cover the costs of reasonable stabilization and reclamation of disturbed areas. However, the basis for establishing the amount of the bond must be clear from the record.

United States v. Lee Jesse Peterson, 125 IBLA 72
(Jan. 6, 1993)

SURVEYS OF PUBLIC LANDS

(See also Boundaries, Public Lands)

GENERALLY

An allegation that a dependent resurvey is void because it impairs bona fide rights is without merit where the record shows that the dependent resurvey is an accurate retracement and reestablishment of the lines of the original survey. Where rights to land are based on patents grounded on the original survey, the dependent resurvey will not affect the location of any boundary lines as it is, by definition, a restoration of the original conditions of the official survey.

John W. & Ovada Yeargan, 126 IBLA 361 (June 29, 1993)

When surveying the boundaries of an Indian reservation created in 1891 on an island off the coast of Alaska, it was not proper to include an island in the reservation that clearly was not included as the reservation was defined by the President in 1916.

State of Alaska, Forest Service, U.S. Dept. of Agriculture, 127 IBLA 1 (July 12, 1993)

AUTHORITY TO MAKE

A decision rejecting a protest of a BLM survey of lands which have been conveyed to a Native corporation will be reversed. Authority to survey the public lands is generally restricted to lands where the U.S. holds legal title.

Bay View, Inc., 126 IBLA 281 (June 7, 1993)

SURVEYS OF PUBLIC LANDS--Continued

DEPENDENT RESURVEYS

BLM properly dismissed a protest of a dependent resurvey of the southern boundary of a Spanish land grant that was unsupported by evidence tending to show that the Department failed to properly perpetuate the location of the southeastern and southwestern corners of the grant, as determined by a survey approved in 1894 by the U.S. Court of Private Land Claims.

Ojo Caliente Craftsmen, Inc., 126 IBLA 290 (June 8, 1993)

The purpose of a dependent resurvey is to trace and reestablish the lines of the original survey in their true and original positions of the original corners. Where a party challenging the filing of a plat for a dependent resurvey fails to meet his burden of establishing by a preponderance of the evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey, the decision dismissing a protest of the dependent resurvey will be affirmed.

An allegation that a dependent resurvey is void because it impairs bona fide rights is without merit where the record shows that the dependent resurvey is an accurate retracement and reestablishment of the lines of the original survey. Where rights to land are based on patents grounded on the original survey, the dependent resurvey will not affect the location of any boundary lines as it is, by definition, a restoration of the original conditions of the official survey.

John W. & Ovada Yeargan, 126 IBLA 361 (June 29, 1993)

TIDELANDS

In sec. 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a) (1988), Congress codified its power to reserve tideland from a state's equal footing entitlement when a state enters the Union by specifically excluding from operation of that Act "all lands expressly retained by or ceded to the United States when the State entered the Union * * * and any rights the United States has in lands presently and actually occupied by the United States under claim of right."

The Supreme Court has articulated a two-pronged test to determine whether a Federal reservation of public land defeats a state's equal footing entitlement: (1) that Congress clearly intended to include land beneath navigable waters (or tideland) within the reservation and (2) affirmatively intended to defeat future state title to such land.

The reservation of the power of exclusive legislation in sec. 11(b) of the Alaska Statehood Act is expressly predicated on the fact of continued Federal ownership of parcels held for Coast Guard purposes, and Congress intended to retain ownership over tidelands reserved for lighthouse purposes by defeating the State's equal footing entitlement.

State of Alaska, 127 IBLA 317 (Oct. 13, 1993)

TIMBER SALES AND DISPOSALS

One appealing the denial of a protest to a timber sale and the attendant EA must affirmatively demonstrate why the decision was in error. Mere disagreement with the timber sale without substantial evidence showing the sale violates or is inconsistent with management policies is insufficient to show error. Likewise, it is the timber sale implementing the timber management plan which is the specific action that may be reviewed for compliance with the pertinent statutes and regulations, and challenges to the general management policies and

TIMBER SALES AND DISPOSALS--Continued

recommendations found in the timber management plan are beyond the Board's review.

In re Bare Nelson Timber Sale, 126 IBLA 93 (Apr. 21, 1993)

The provisions of 43 CFR 4.21(a), 58 FR 4942-43 (Jan. 19, 1993), govern the effect of a decision pending appeal "[e]xcept as otherwise provided by law or pertinent regulation." The regulations governing the administration of forest management decisions, including timber sale decisions, 43 CFR Part 5000, contain a "pertinent regulation" that meets the exception of 43 CFR 4.21(a). Under 43 CFR 5003.1, "[t]he filing of a notice of appeal under part 4 of this title shall not automatically suspend the effect of a decision governing or relating to forest management as described under subparts 5003.2 and 5003.3," and upon denial of a protest, the authorized officer may proceed with implementation of the decision. 43 CFR 5003.3(f).

A decision by BLM denying a protest of a timber sale may be affirmed where the SOR filed in support of an appeal merely repeats, with little change, arguments raised in the protest and fails to present any new issues or point out any error in the decision appealed from, and the BLM decision is comprehensive and fully addresses each of the arguments contained in the protest.

In Re Eastside Salvage Timber Sale, 128 IBLA 114 (Dec. 20, 1993)

TOWNSITES

Where a decision of the Alaska Townsite Trustee, approving one of two conflicting applications for the same townsite lot, is based on a state divorce decree, rather than on the statutes and regulations governing townsites in Alaska, that decision will be vacated and remanded for a determination of who occupied the lot or was entitled to occupancy thereof on the date of approval of the final subdivisional survey.

Joe L. Herbert, 128 IBLA 13 (Nov. 3, 1993)

TRESPASS

GENERALLY

Where the record raises a question of fact regarding whether an individual, charged by BLM under 43 CFR 2920.1-2(a) with the costs of removing structures allegedly placed in trespass on public lands, was responsible for their construction or use, the case will be referred for a hearing on that question.

John H. Peterson, 125 IBLA 267 (Feb. 17, 1993)

A statute establishing time limitations for the commencement of judicial actions for damages on behalf of the U.S. does not limit administrative proceedings within the DOI.

A trespasser is properly considered willful where the trespasser ignores its mineral materials sales contract's authorized quantity and expiration date and removes mineral material in excess of the stated contract amount over a 5-year period after the contract expires.

Bolling Construction Co. & Bob Bolling, 125 IBLA 303 (Mar. 16, 1993)

TRESPASS--Continued

GENERALLY--Continued

The regulations at 43 CFR 3603.1 and 43 CFR 9239.0-7 prohibit the removal of mineral material except when authorized by a sale or permit issued under the Materials Act and Departmental regulations. A finding that no trespass occurred because BLM authorized the removal of gravel by means other than issuance of a permit or sales contract will be reversed.

When BLM has indicated to a trespasser that gravel extraction operations may continue, there is no basis for concluding that the continued operations were unreasonable or lacked good faith. Absent evidence showing knowledge that the violation is occurring or a reckless disregard for whether a violation is occurring, there is no justification for imposing what are essentially punitive damages for willful trespass. In such a case the Board will find, in the interest of fundamental fairness, that BLM is precluded from charging that the operator, who remained in trespass with permission to continue operations, but absent formal authorization, was in willful trespass.

Richard Connie Nielson v. The Bureau of Land Management,
125 IBLA 353 (Mar. 30, 1993)

Where it is clear that lands on which a dam, pond, and field are situated are Federal lands and that no right-of-way or temporary use permit was issued either to place the dam or pond on those lands or to cultivate them, a trespass exists.

Enclosing public lands by fencing them is itself an act of trespass. It is axiomatic that no legal entitlement is created by illegally enclosing lands. Thus, the fact that Federal lands on which the improvements were made may have been fenced as though they belonged to a person is not significant in determining whether there was a trespass.

Where un rebutted evidence shows that BLM never advised a trespasser (in writing or orally) that a pending land exchange application would resolve all

TRESPASS--Continued

GENERALLY--Continued

outstanding trespasses, and where it was clear both from a notice of realty action published in the Federal Register and from the issuance of patent that lands where an agricultural trespass was ongoing were not in fact covered by the exchange, BLM is not estopped from prosecuting either that agricultural trespass or the subsequent construction in trespass of a dam and pond on the same public lands. The trespasser, as the exchange applicant, properly bore the burden of bringing the question of the ownership of the lands covered by the agricultural trespass into the exchange negotiations.

BLM may properly require the removal of improvements constructed in trespass on public lands, even where placed without knowledge of the trespass, as part of its authority to require a trespasser either to rehabilitate lands harmed by the trespass or to pay the costs incurred by the United States in doing so.

Double J Land & Cattle Co., Peter A. Jaffe, 126 IBLA 101 (Apr. 21, 1993)

When a mineral materials purchase and sales contract expire, subsequent removal of mineral material is an act of trespass.

CM Concepts of Nevada, 126 IBLA 134 (May 4, 1993)

Use of a road on Oregon and California lands for hauling logs before a permit is issued is a willful trespass under 43 CFR 2800.0-5(v).

When the record does not support the calculation of fees for the unauthorized use of a road and of penalties under 43 CFR 2801.3(b)(2) and (c), the calculation of liability will be set aside and remanded.

Larry D. Olson, 126 IBLA 229 (May 24, 1993)

TRESPASS--Continued

GENERALLY--Continued

The unauthorized removal of material (topsoil) from public lands under the jurisdiction of the DOI is an act of trespass.

BLM's determination of the volume of material removed in trespass is properly affirmed where it is amply supported by the record, where BLM has supported its conclusions with a thorough exposition of its methodology, and where the appellant fails to establish error in the methodology BLM used to collect data and its interpretation of that data to determine the amount of material removed from the site. Appellant's anecdotal evidence concerning observations of conditions at the site is insufficient to overcome BLM's documented survey of those conditions.

Anyone properly determined by BLM to be in trespass is liable to the U.S. under 43 CFR 2801.3(b), among other things, for either rehabilitating the lands harmed by the trespass or for the costs incurred by the U.S. in so doing.

Absent controlling State law, damages for an unintentional trespass involving removal of topsoil are the market value of the severed material less the expenses of severing it. Where the record does not contain a clear application of that rule, in that BLM did not take into account the expenses of severing the topsoil, BLM's decision is properly set aside and the case remanded to do so.

Pine Grove Farms, 126 IBLA 269 (June 3, 1993)

MEASURE OF DAMAGES

A trespasser is properly considered willful where the trespasser ignores its mineral materials sales contract's authorized quantity and expiration date and

TRESPASS--Continued

MEASURE OF DAMAGES--Continued

removes mineral material in excess of the stated contract amount over a 5-year period after the contract expires.

Bolling Construction Co. & Bob Bolling, 125 IBLA 303
(Mar. 16, 1993)

Absent clearly controlling state law, damages for unintentional gravel trespass may be based on either the value of the gravel in place or market value at the site of the processed gravel, less the expenses of severing and processing it, whichever is greater.

Richard Connie Nielson v. The Bureau of Land Management,
125 IBLA 353 (Mar. 30, 1993)

Anyone properly determined by BLM to be in trespass is liable to the United States for (1) reimbursement of all costs incurred by the United States in the investigation and termination of a trespass; (2) the rental value of the lands for the time of the trespass; and (3) either rehabilitating the lands harmed by the trespass or for the costs incurred by the United States in so doing. Where a trespasser does not take issue with the details of BLM's assessment of liability, and that assessment is in accordance with those principles, the assessment is properly affirmed.

BLM may properly require the removal of improvements constructed in trespass on public lands, even where placed without knowledge of the trespass, as part of its authority to require a trespasser either to rehabilitate lands harmed by the trespass or to pay the costs incurred by the United States in doing so.

Double J Land & Cattle Co., Peter A. Jaffe, 126 IBLA
101 (Apr. 21, 1993)

TRESPASS--Continued

MEASURE OF DAMAGES--Continued

Evidence of knowledge that a violation is occurring or a reckless disregard for whether a violation is occurring is essential to a finding of willful trespass. Standing alone, knowledge that specific behavior is regulated will not support a finding that the violation was willfully committed or a finding that it was committed with reckless disregard. The test is the trespasser's actual intention at the time of the violation.

The rule of damages applied for mineral materials trespass is the measure of damages prescribed by the laws of the state in which the trespass is committed. Both statutes and state court decisions prescribing mineral trespass damages are applicable.

CM Concepts of Nevada, 126 IBLA 134 (May 4, 1993)

When the record does not support the calculation of fees for the unauthorized use of a road and of penalties under 43 CFR 2801.3(b)(2) and (c), the calculation of liability will be set aside and remanded.

Larry D. Olson, 126 IBLA 229 (May 24, 1993)

Anyone properly determined by BLM to be in trespass is liable to the U.S. under 43 CFR 2801.3(b), among other things, for either rehabilitating the lands harmed by the trespass or for the costs incurred by the U.S. in so doing.

Absent controlling State law, damages for an unintentional trespass involving removal of topsoil are the market value of the severed material less the expenses of severing it. Where the record does not contain a clear application of that rule, in that BLM did not take into account the expenses of severing the topsoil, BLM's

TRESPASS--Continued

MEASURE OF DAMAGES--Continued

decision is properly set aside and the case remanded to do so.

Pine Grove Farms, 126 IBLA 269 (June 3, 1993)

A determination to assess damages for removal of sand and gravel from Federal lands made by a contractor who lacked a contract of sale with BLM for the materials taken was properly assessed as a willful trespass. An unrelated transaction involving an earlier expired materials contract with BLM did not establish that the trespass was innocent so as to justify assessment at a lesser rate.

Hess Construction Co., 126 IBLA 353 (June 29, 1993)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY
ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)
(See also Appeals)

UNIFORM REAL PROPERTY ACQUISITION POLICY

Expenses Incidental to Transfer of Title to
the United States

A claim for reimbursement of real property transfer taxes paid in connection with conveyance of title to real property acquired by the U.S., filed after the time allowed for filing by Departmental regulation, is properly denied as untimely.

Uniform Relocation Assistance Appeal of Mrs. Gretchen
Bain (Trustee), 10 OHA 98 (July 22, 1993)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY
ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)--Continued

UNIFORM RELOCATION ASSISTANCE

Generally

A relocation assistance benefits claim which is filed within the 6-month limitations period provided in a court order is timely filed.

Relocation assistance benefits claims filed several years after the claimant's displacement from the Government-acquired property concerned are properly denied as untimely under Departmental regulation 49 CFR 24.207(d).

A relocation assistance benefits claim for moving and related expenses incurred as a result of displacement from Government-acquired property will remain denied, on the basis of collateral estoppel, where the claimant has received a court judgment in full settlement for such moving and related expenses.

Uniform Relocation Assistance Appeals of Terra Vista Estates Inc., 10 OHA 1 (Apr. 27, 1993)

A relocation assistance benefits claim which is filed within the 6-month limitations period provided in a court order is timely filed.

A relocation assistance benefits claim for moving and related expenses incurred as a result of displacement from Government-acquired property will remain denied, on the basis of collateral estoppel, where the claimant has received a court judgment in full settlement for such moving and related expenses.

Uniform Relocation Assistance Appeals of The DeFranco Co., Inc., 10 OHA 20 (May 18, 1993)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY
ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Generally--Continued

Where claimants commenced occupancy of Government-acquired property after the property was acquired by the U.S. and subsequently moved therefrom upon expiration of a reserved residential right of use and occupancy of the property, the claimants did not move as a result of the acquisition of the property by the U.S. and consequently they do not qualify as displaced persons and are not eligible for moving benefits under sec. 202 of the Uniform Act and the Department's implementing regulations.

Uniform Relocation Assistance Appeal of Mr. & Mrs.
Edward L. Rant, 10 OHA 36 (June 28, 1993)

Replacement Housing Payment for Homeowners

Last Resort

When the record shows appellants have been paid the difference between the reasonable cost of a comparable replacement dwelling and the acquisition cost of the Government-acquired dwelling, appellants' claim for a supplemental payment over and above the amount they have received is properly denied.

Uniform Relocation Assistance Appeal of Mr. & Mrs.
Robert L. Skinner, 10 OHA 110 (Aug. 31, 1993)

WATER AND WATER RIGHTS

GENERALLY

A BLM decision to issue a right-of-way grant for an irrigation ditch and associated structures will be affirmed on appeal when based on a reasoned analysis of all relevant factors, including the threat to the human environment from potential breaches of the ditch and to the rights of downstream water users from the diversion of water, and provided the decision was made with due regard for the public interest and sufficient reasons for disturbing the decision have not been shown.

Daryl Richardson et al., 125 IBLA 132 (Jan. 15, 1993)

WILD AND SCENIC RIVERS ACT

BLM properly required the operator of a placer mining claim to conform suction dredging operations in a river designated for potential addition to the national wild and scenic rivers system and related occupancy to a modified plan of operations because such operations do not constitute casual use under 43 CFR 3809.0-5 (1991).

Pierre J. Ott, 125 IBLA 250 (Feb. 11, 1993)

A determination by BLM that approval of an APD to drill a natural gas well will not eliminate a river from eligibility for potential inclusion within the National Wild and Scenic River System, pursuant to sec. 5(d) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1276(d) (1988), is supported by the record where there is no evidence in the record that drilling the well in question would adversely affect all the river's outstandingly remarkable values so as to render it ineligible for consideration.

Southern Utah Wilderness Alliance et al., 128 IBLA 52 (Dec. 2, 1993)

WILD FREE-ROAMING HORSES AND BURROS ACT

BLM may properly cancel private maintenance and care agreements for wild horses and repossess the horses when there is sufficient evidence of improper care of the adopted animals to establish that the adopter violated the terms of the agreement.

Freddie R. Mason, 126 IBLA 28 (Apr. 13, 1993)

The Wild Free-Roaming Horses and Burros Act authorizes the Secretary to make excess wild horses available for private maintenance and care by qualified individuals. An applicant must have no prior conviction for inhumane treatment of animals or for violation of the Act or its implementing regulations.

A BLM decision rejecting an application to adopt a wild horse on the ground that an applicant has violated a regulation implementing the Wild Free-Roaming Horses and Burros Act will be set aside if the applicant has not been convicted of the violation as provided in 43 CFR 4750.3-2(a)(2), and a substantial issue exists as to the applicant's responsibility for the violation. The regulation contemplates that issues of culpability will be resolved in a proceeding that would lead to a conviction rather than an appeal to this Board.

A person who has expressed an intent to commercially exploit an animal after receiving title is not a qualified applicant. When determining whether an applicant is qualified it is proper for BLM to ascertain an applicant's long-term intent in order to assure that the horse's humane treatment and care will continue after title transfers.

Marvin Cook, 126 IBLA 158 (May 10, 1993)

WILD FREE-ROAMING HORSES AND BURROS ACT--Continued

BLM properly cancelled a private maintenance and care agreement for a wild or free-roaming burro upon receiving proof that the animal subject to the agreement was in a deteriorated condition. Evidence offered by the burro's custodian to establish that a genetic defect was the cause of the burro's observed hoof condition was not adequate to overcome contrary medical evidence based on an actual examination of the adopted burro where the evidence of genetic defect offered by the adopter related to other animals not covered by the maintenance agreement.

John P. Wiley, 126 IBLA 261 (June 2, 1993)

BLM properly canceled a private maintenance and care agreement for three wild horses and took possession of a remaining wild free-roaming horse where the record established that the adopter violated the terms of his agreement by selling the other two horses before title to them was issued by BLM.

Darby L. Ryland, 126 IBLA 371 (June 30, 1993)

The provisions of 43 CFR 4.21(a), 58 FR 4939, 4942-43 (Jan. 19, 1993), govern the effect of a decision pending appeal "[e]xcept as otherwise provided by law or pertinent regulation." Because 43 CFR 4770.3(c) authorizes BLM to place into full force and effect a decision to remove wild horses from public or private land regardless of an appeal, the effect of such removal decisions pending appeal are controlled by that regulation, not 43 CFR 4.21(a), and BLM's failure to place such a decision into full force and effect effectively stays the removal decision pending appeal.

Michael Blake et al., 127 IBLA 109 (Aug. 12, 1993)

WILD FREE-ROAMING HORSES AND BURROS ACT--Continued

The effectiveness of a BLM decision to round up and remove wild horses during the pendency of an appeal to the Board of Land Appeals is controlled by 43 CFR 4770.3(c), not by 43 CFR 4.21(a) (58 FR 4942-43 (Jan. 19, 1993)). Where BLM fails to place its roundup decision into full force and effect on a specified date, pursuant to 43 CFR 4770.3(c), and a notice of appeal of that decision is timely filed, it is error for BLM to proceed with the roundup, as the effect of BLM's decision is stayed during the appeal period and pending the Board's ruling on the appeal.

An appeal from a BLM decision to round up horses is not moot, even though the horses have been removed, as remedies are available (even apart from returning the same horses to the range) if BLM's decision is found to be in error. BLM may be directed to allow the population of wild horses to return to its former numbers or to repopulate the range with other animals taken from its holding areas. Further, the appeal is not moot, as it is capable of repetition, in that the population of wild horses may return in time to former numbers through propagation of the remaining horses.

Animal Protection Institute of America, 128 IBLA 90 (Dec. 10, 1993)

WILDERNESS ACT

A determination by an authorized officer that dredging operations capable of moving over 2,400 yards of earth annually within the meaning of 43 CFR 3809.0-5 from the Merced River did not constitute "casual use" was not overcome by an allegation that less than 5 acres of land would be disturbed by such activity.

A reclamation bond was properly required for operations conducted within a wild and scenic river study

WILDERNESS ACT--Continued

area pursuant to a plan of operations. 43 CFR 3809.1-9(b).

Lloyd L. Jones, 125 IBLA 94 (Jan. 8, 1993)

WILDLIFE REFUGES AND PROJECTS

(See also Exchanges of Land, Migratory Bird Conservation Act)

GENERALLY

The Secretary may withdraw wildlife refuge lands regardless of the date on which the lands were placed in the National Wildlife Refuge. However, sec. 1410 does not authorize the Secretary to withdraw park or refuge lands located outside the boundaries of the original ANCSA withdrawals.

Authority of the Secretary to Withdraw Land Within National Parks & Wildlife Refuges for Selection by Underselected Alaska Native Village Corporations, M-36972 (Oct. 16, 1991) 100 I.D. 163

WITHDRAWALS AND RESERVATIONS

GENERALLY

A placer mining claim was properly declared null and void because it was located on land withdrawn from mining when the claimants failed to show that they had an unbroken chain of title to locators of a claim located prior to withdrawal.

Gary Hoefler et al., 127 IBLA 211 (Sept. 14, 1993)

WITHDRAWALS AND RESERVATIONS--Continued

EFFECT OF

In order to defeat a future state's title to submerged lands, the two-pronged test articulated in Utah Div. of State Lands v. U.S., 482 U.S. 193 (1987), must be successfully applied. That test requires that: 1) Congress clearly intended to include land under navigable waters within the reservation and 2) affirmatively intended to defeat future state title to such land. This test does apply to the P.L.O 82 withdrawal.

That the text and purpose of P.L.O. 82, by its broad and all-inclusive language, clearly intended to include lands underlying navigable waters.

Where the Executive intended through P.L.O. 1621 to defeat Alaska's future title to submerged lands within the boundaries of the National Petroleum Reserve Numbered 4, and the proposed boundaries of the Arctic National Wildlife Refuge, and that Congress affirmed this executive intent in sec. 6(e) of the Alaska Statehood Act.

Where sec. 11(b) of the Alaska Statehood Act is an express retention of lands for military purposes within the meaning of sec. 5(a) of the Submerged Lands Act.

This supplemental decision modifies the findings in M-36911 and harmonizes them with the Supreme Court decision in Utah Div. of State Lands v. U.S., 482 U.S. 193 (1987).

Ownership of Submerged Lands in Northern Alaska in Light of Utah Div. of State Lands v. U.S., M-36911 (Supp. I) (Apr. 20, 1992) 100 I.D. 103

WITHDRAWALS AND RESERVATIONS--Continued

EFFECT OF--Continued

A mining claim located upon lands withdrawn from mineral entry is properly declared null and void.

Where lands are withdrawn from location under the mining law, "subject to valid existing rights," the withdrawal attaches, as of the date of the withdrawal, to all land described by the withdrawal, including the lands covered by unpatented mining claims. The withdrawal is not effective against the claimant's possessory right, but, if the withdrawal is still in existence at the time the claims are abandoned, the withdrawal becomes effective, eo instanti, as to the land covered by such claims, and future mining claim locations are precluded.

Cotter Corp., 127 IBLA 18 (July 13, 1993)

Mining claims located on lands closed to mineral entry are null and void ab initio. Because such claims create no property rights, no rights were infringed when BLM found three claims located on lands closed to mineral entry to be null and void.

Barbara J. Cole, 127 IBLA 120 (Aug. 18, 1993)

In sec. 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a) (1988), Congress codified its power to reserve tideland from a state's equal footing entitlement when a state enters the Union by specifically excluding from operation of that Act "all lands expressly retained by or ceded to the United States when the State entered the Union * * * and any rights the United States has in lands presently and actually occupied by the United States under claim of right."

The Supreme Court has articulated a two-pronged test to determine whether a Federal reservation of public land defeats a state's equal footing entitlement: (1) that Congress clearly intended to include land beneath navigable waters (or tideland) within the

WITHDRAWALS AND RESERVATIONS--Continued

EFFECT OF--Continued

reservation and (2) affirmatively intended to defeat future state title to such land.

The reservation of the power of exclusive legislation in sec. 11(b) of the Alaska Statehood Act is expressly predicated on the fact of continued Federal ownership of parcels held for Coast Guard purposes, and Congress intended to retain ownership over tidelands reserved for lighthouse purposes by defeating the State's equal footing entitlement.

State of Alaska, 127 IBLA 317 (Oct. 13, 1993)

Sec. 1410 of ANILCA authorizes the Secretary to withdraw lands within units of national parks and wildlife refuges to satisfy village corporation ANCSA entitlements if the land had been withdrawn during the original ANCSA selection period for selection by specific village corporation. Because lands within national parks in existence on Dec. 18, 1971 (the date of ANCSA's enactment) were excluded from the original withdrawals, such park lands may not be withdrawn now. The Secretary may withdraw park lands added to the National Park system after ANCSA's enactment.

The Secretary may withdraw wildlife refuge lands regardless of the date on which the lands were placed in the National Wildlife Refuge. However, sec. 1410 does not authorize the Secretary to withdraw park or refuge lands located outside the boundaries of the original ANCSA withdrawals.

Authority of the Secretary to Withdraw Land Within National Parks & Wildlife Refuges for Selection by Underselected Alaska Native Village Corporations, M-36972 (Oct. 16, 1991) 100 I.D. 163

WITHDRAWALS AND RESERVATIONS--Continued

POWERSITES

BLM properly declared placer mining claims partially null and void ab initio that included land which, at the time of location, was subject to a license for a power project under a powersite withdrawal and was therefore closed to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955, as amended, 30 U.S.C. § 621(a) (1988).

Bob & Kayla Alejandre, 125 IBLA 104 (Jan. 12, 1993)

REVOCATION AND RESTORATION

Mining claims located on lands closed to mineral entry are null and void ab initio. Because such claims create no property rights, no rights were infringed when BLM found three claims located on lands closed to mineral entry to be null and void.

Barbara J. Cole, 127 IBLA 120 (Aug. 18, 1993)

WORDS AND PHRASES

"Adjacent." Where the term "adjacent" is used but not defined in the regulations governing trust acquisitions of land for Indians, the Board of Indian Appeals declines to impose an interpretation upon the BIA, but, instead refers to the Ass't Secretary--Indian Affairs an appeal in which the meaning of the term is at issue.

Virginia Cross v. Acting Portland Area Director, Bureau of Indian Affairs, 23 IBIA 149 (Jan. 11, 1993)

WORDS AND PHRASES--Continued

"Bona fide selling price," "posted price,"
and "offered price." These words are defined for
purposes of 25 CFR Part 226.

Okie Crude Co., et al. v. Muskogee Area Director, Bureau
of Indian Affairs, 23 IBIA 174 (Feb. 5, 1993)

"Ex post facto law." The term "ex post facto law"
in the Indian Civil Rights Act of 1968, 26 U.S.C.
§ 1302(9) (1988), should not be given a broader inter-
pretation than the same term in the Constitution of the
U.S., Art. I, sec. 9, cl. 3, and sec. 10, cl. 1.

Janie Jovita Flores et al. v. Acting Anadarko Area
Director, Bureau of Indian Affairs, 25 IBIA 6 (Nov. 12,
1993)

